

Collective Labour Rights and European Influences in the United Kingdom and Germany

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Abstract

The purpose of this research is to analyse the differences between the German and British system of industrial relations, with particular emphasis on the influence of EC legislation. The first three chapters will provide an historical and methodical background, with the first chapter tracing the respective history of trade unions in each country. Chapter 3 will present the history of works councils and the Works Constitution Act in Germany and European Influences on the British System of Workers' Representation. Chapter 3 will highlight core differences while Chapter IV will present problems trade unions are facing on a national, European and global scale. Suggested Solutions to these problems will be discussed. Chapter V – the conclusion – will assess the benefits of the German and the British system of industrial relations while at the same time trying to determine which system is better equipped to deal with the problems presented. Suggestions as to the future course of actions of trade unions will be presented.

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Glossary

Angestellter	White-collar worker
Arbeiter	Blue-collar worker.
Arbeiterschutzgesetz	Law for the protection of workers
Arbeitskampf	Industrial action
Arbeitszeitverkürzung	Reduction in working hours. An important and controversial topic in the mid 1980s in Germany was the fight for the 35-hour week.
BAG	Bundesarbeitsgericht – Federal Labour Court
Betrieb	The translation of <i>Betrieb</i> is company, enterprise, shop or plant; however, under German law the term is defined as “organisational entity of means for work by means of which the employer, together with his employees, pursues one or several work-related ends”. A <i>Betrieb</i> is characterised by a uniform organisation, it is therefore crucial where the decision of the employer regarding the employees are taken.
Betriebliche Einheit	Company entity.
Betriebliche Öffnungsklauseln	<i>Öffnungsklausel</i> may be translated as

	<p>‘opening’ or ‘opt-out clause’.</p> <p>According to § 4 III TVG, they allow to agree on less favourable terms than provided for in the collective agreement.</p>
Betriebsegoismus	<p>Literally ‘plant egoism’. Due to its position in the plant, a works council might try to achieve merely better conditions for their constituents while neglecting broader aims.</p>
Betriebsführer	<p>Literally works manager; a figure in industrial relations under Hitler.</p>
Betriebsnahe Tarifpolitik	<p>The demand for a greater shop-floor role in collective bargaining that surfaced after the wildcat strike of the late 1960s and early 1970s in Germany.</p>
Betriebsrätegesetz	<p>Law on works councils.</p>
Betriebsvereinbarung	<p>Agreements between employer and works council on plant level; wages and conditions that either are or <i>typically</i> are determined by collective agreements are not allowed to be regulated by <i>Betriebsvereinbarung</i> (§77 III BetrVG).</p>
Betriebsverfassungsgesetz	<p>Works constitution Act.</p>
Bundesrepublik	<p>Federal republic.</p>
Bündnis für Arbeit	<p>Alliance for Jobs. A new revival of the <i>Konzertierte Aktion</i> from the 1960s and 1970s. Started after the change in Government in 1998 (and deactivated</p>

after 2002) in which Government and top-representatives of unions and employers' association agreed on measures that had the aim to reduce unemployment, create jobs and enhance the competitiveness of the German economy.

DAG

Deutsche Angestellten Gewerkschaft – German clerical workers' union.

DGB

Deutscher Gewerkschaftsbund – the German Trade Union Federation

Drohpotential

Literally „threatening potential“, the ability of a union to deliver convincing threats of industrial or other action.

Einheitsgewerkschaft

A union organisation in the form of a single, strong union for all workers, regardless of enterprise or occupation, encompassing a number of industry and occupational groups.

Flächentarifvertrag

Agreements that have been concluded between a union and an employers' organisation on regional or national level.

Frankfurter Nationalversammlung

The *Frankfurter Nationalversammlung* was the first freely elected parliament comprising all of Germany. After the revolution of 1848 it drafted a constitution, which, due to the refusal of Prussia's King Friedrich Wilhelm IV. to accept the Kaiser's crown, never was

	enacted.
Friedenspflicht	Peace Obligation – the duty to not resort to industrial action during the validity of a collective agreement
Führerprinzip	The <i>Führerprinzip</i> (literally ‘leader principle’) was a main principle of national socialistic Weltanschauung, applied not only in politics but also in economical and social life. It is based on a restructuring of power on strict order lines. Instead of democratic structures, <i>Führer</i> are given the power to govern on the principle of ‘order and obedience’, in fact blind obedience (<i>Führer befehl, wir folgen</i> – Leader, command and we will follow) is a main characteristic of the principle. All political power was concentrated in Hitler as the most superior <i>Führer</i> .
Gewerbeordnung	Trade, Commerce and Industry Regulation Act
Gewerkschaftliche Vertrauensleute	Literally ‘union trust people’. They provide a link between the union and its members at the shop floor, but, unlike the British shop steward, they enjoy neither bargaining nor participation rights.
Großer Senat	A Senate of the Federal Employment Court comprised of members of its two ordinary senates and lay judges from the

	<p>employers' as well as the employees' side. If a Senate plans to deviate from a decision of another Senate or the <i>Großen Senates</i>, an appeal to the <i>Große Senat</i> is possible. An appeal is also possible in legal decision of fundamental importance if necessary for the development of the law and the safeguarding of consistent jurisdiction.</p>
Gruppenprinzip	<p>Group-principle. Under this principle, blue- and white-collar workers elected their representatives to the works council separately.</p>
Günstigkeitsprinzip	<p><i>Günstigkeitsprinzip</i> may be translated as 'favourability principle'. Laid down in § 4 II TVG it stipulates that, where no <i>Öffnungsklausel</i> is present, departure from the terms of a collective agreements is only allowed when the new regulation is more favourable to the employee.</p>
Humanisierung der Arbeit	<p>Humanisation of work. The concept contained various offensives to improve working conditions in order to facilitate self-development and self-realisation. The first phase between 1974 and 1989 included attempts to better work contents and work relations, and a reduction of cumbering or unhealthy labour situations.</p>
Interessenausgleich	<p><i>Interessenausgleich</i> may be translated as</p>

	<p>“reconciliation of interests”. If employer and works council don't succeed in concluding an <i>Interessenausgleich</i>, they can appeal to either the head of the Federal Employment Office for arbitration (§ 112 II 1 BetrVG) or to the normal arbitration board.</p>
Kampfparität	<p>Literally ‘battle parity’; a very important concept used by the BAG when it comes to judge actions in a strike. It entails that all measures in a strike are judged in regard to if they give one side an unfair advantage over the other.</p>
Konjunkturpolitik	<p>Business cycle policy.</p>
Leitender Angestellter	<p>Executive employee.</p>
NSDAP	<p>Nationalsocialistic German Workers' Party – the Nazi Party</p>
Rätebewegung	<p>Council movement</p>
Restmandat	<p>A <i>Restmandat</i> emerges when a <i>Betrieb</i>, due to closedown, demerger or merger ceases to exist. The works council will then remain in office as long as it is necessary to exercise the participation and codetermination rights in regards to the breakup (§ 21b BetrVG).</p>
Schutzwürdiges Interesse	<p>Literally ‘interest worthy of protection’.</p>

	<p>A <i>schutzwürdiges Interesse</i> must be present for a terminating lockout to be justified.</p>
Sozialadäquat	<p>Literally ‘social acceptable’. According to the BAG (BAG, Großer Senat, January 28th, 1955, GS 1/54), a strike is socially acceptable when it neither interrupts the peace duty, nor constitutes, according to its means, its aims or the disproportionality of means and aims, socially inappropriate action (for example a direction intervention into employers’ enterprises). An immoral strike (immorality as defined in § 826 BGB) would also not be socially acceptable</p>
Sozialgesetzbuch	<p>Code of social law.</p>
Sozialplan	<p><i>Sozialplan</i> is a social compensation plan, designed to alleviate the economic disadvantages employees may suffer due to the changes. A <i>Sozialplan</i> can be enforced by appealing to the arbitration board (§ 112 IV BetrVG).</p>
SPD	<p>Social Democratic Party</p>
Stabilitätsgesetz	<p><i>Stabilitätsgesetz</i> can be translated as Stability law – law to promote stability</p>

and growth of the economy. The aim was for all parties participating in the economic process to coordinate their actions in order to overcome the economic crisis. The idea was for representatives of the federal ministries of economics, of finance and labour, of the federal bank and the *Bundeskartellamt*, of the council of experts (*Sachverständigenrat*) as well as representatives of the business associations and the unions to meet several times per year to discuss pending economic problems, wage contracts and industrial planning, thus creating economic stability. The reciprocal information on each others expectations and interest was desired, but the meetings were not intended to reach binding arrangements that would limit the responsibility/decision-making powers of the government and free collective bargaining (*Tarifautonomie*). The first talks in 1967 included employers' association, unions, representatives of agriculture and representatives of the federal state, the individual states and the municipalities (*Bund, Länder und Gemeinden*). Although it continued to exist until the unions withdrew in 1977, it was ineffective before that.

Tarifvereinbarungen	Literally tariff acknowledgement – agreements between workers’ organisations and employers on wages; however, less extensive than ordinary collective agreements.
Tarifvertragsgesetz (TVG)	Law on Collective Agreements.
Tarifvertragsordnung	Regulation on collective agreements.
Übergangsmandat	An <i>Übergangsmandat</i> results when a <i>Betrieb</i> is split up. The former works council will then remain, under certain circumstances laid down in § 21a BetrVG, in office until a new council is elected.
Unerlaubte Handlungen	Tortious acts or civil offences.
Unternehmen	<i>Unternehmen</i> is defined as “a organisational entity, defined by its economical or ideational intention, to which intention are serving one or several organisationally linked <i>Betriebe</i> of the same <i>Unternehmen</i> ”.
ver.di	Vereinte Dienstleistungsgewerkschaft – unified services unions, the German equivalent to UNISON.

Vertrauensräte

Literally trust councillors. In the Third Reich, those were selected by the employer in accordance with the NSDAP. Even though they should act as representatives, they had only advisory functions.

Introduction

This research compares the German and the British system of (collective) industrial relations in order to determine which one is of more benefit to the individual worker. At the same time, it will be tried to determined which, if any, of the two systems might be better equipped to deal with problems presented by Europeanisation and Globalisation. The purpose of the research thus is an assessment of the two systems; where they are coming from and where they might be going. Trade unions face a number of problems, be it unemployment, decline in membership or globalisation and it is felt that unions must react. At the same time, European policies and developments have more and more influence on national industrial relations. A unified European trade union response is necessary and the research will present ideas for it and will try to determine what rights and facilities are necessary in order to facilitate it. In order to approach the question how a future European trade union movement might be structured, a comparison of the German and the British system seems helpful. These systems can be seen as presenting two opposite poles in the spectrum of industrial relations (legalistic and voluntaristic), a comparison therefore might give hints as to whether a future European trade union movement would benefit from a more legalistic or a more voluntaristic approach. Therefore, the thesis will try to assess which system is of more benefit to the individual worker on a national scale before trying to assess which system might be better adapted to deal with the ideas for European and international responses presented in the thesis.

In order to facilitate such a comparison, first a short history of trade unions in the two countries needs to be presented, for, as Edwards has put it, “the legacy of the past shapes

current developments, a point which applies particularly strongly in Britain”¹. Since the German system consists of two channels and there is a strong suspicion that the British, due to European influences, might be developing in a similar direction, the second chapter will deal with these (emerging) second channels of representation; presenting the German systems of works councils and trying to assess the changes to the British system. Subsequently, key differences between the systems will be pointed out. Afterwards, problems unions are facing on a national, European and global scale will be presented and suggested solutions discussed. The conclusion will try an assessment of the two systems by trying to determine the benefits offered to workers nationally by trying to determine which might be better able to deal with the challenges presented by Europeanisation and Globalisation. Finally, suggestions as to the future development of unions will be made.

¹ Paul Edwards “The Employment Relationship” *in* Paul Edwards “Industrial Relations: Theory and Practice in Britain” Oxford 1995, p. 3ff. (p. 5).

Methodology

The research has been desk-based and comprised extensive literature review on various topics. To gain a historical understanding of the different issues and developments of German and British industrial relations, first a historical outline is given. It has been composed of an extensive literature review of textbooks, historical studies and journal articles. While the years up to the late 1960, mid 1970s have mainly been covered by an analysis of textbooks, historical studies and occasional case law; the analysis of later years has also included primary sources. Journal articles on new (legal) developments, written at the time, have provided a “contemporary witnesses” view and given an idea of the expectations connected with the new legislation or with new developments.

The thesis compares the British and the German systems of industrial relations and has been written predominantly in the UK. Access to materials on German history and developments has therefore been difficult at times. Apart from the – widely used – facility to order books via the Document Delivery Service, several on-line resources have been helpful (for example, the on-line database of the *Hans-Böckler-Stiftung*, a union foundation, has been helpful on German union history). While the databases available via the Stirling University's Athens Authorisation give no access to German articles or case-law, some, mainly newer, cases were available via the website of the courts or could be located by utilizing search engines. Additionally, during visits to Germany, research has been undertaken at the law library of University Hamburg, giving access to a vast number of textbooks on German industrial relations law as well as to various journals; ranging from legal journals to union publications. An abundance of information was available this way.

The thesis researches problems and possible solutions trade unions are facing on a national, European and global level. Information on these supranational topics was predominantly available via journals present the Stirling University Library and via on-line access to journals and articles; while not much information was available in textbooks. The websites of international (union) actors like the ILO and International Transport Workers' Federation have been useful as well.

The research has been undertaken by desk-based research rather than by doing fieldwork or conducting interviews. There are several pros and cons to this approach. First, once a basic historical overview had been established, interviews could have been used to validate the theoretical account with personal experiences. Personal views could have also provided the research with a different perspective or focus (e.g. on the actual impacts on everyday industrial relations) that might have been overlooked when relying on more abstract accounts. On the other hand, I am a lawyer to be, not a social scientist, and the thesis is, to a large part, concerned with legal developments. Personal experiences, that might be influenced by a lot of other factors beside the legislation and that are necessarily limited to the personal sphere of the interviewee, have therefore been regarded as less important than accounts of the impact on industrial relations as a whole. Such accounts have, for example, been available in the WERS Industrial Relations surveys. At the same time, reasons behind legislation or economic developments have been important for the thesis and those are difficult to research with personal interviews. Due to the factors mentioned, the use of interviews would have been restricted to the parts on trade union history and it was felt that the information available via the sources utilized was sufficient. Finally, research based on a multitude of articles, books and cases at the same times gives access to a multitude of opinions, views and interpretations, thus facilitating a more differentiated view.

Thus, while some interviews might have provided the research with more direct personal experiences of the impact of different measures described in the text, the points in favour of desk-based research prevailed; not least because of short time available for completion of the thesis.

Chapter I – A History of Collective Agreements

Introduction

The purpose of this research is to try an assessment of the different systems of industrial relations present in the UK and Germany. For such a comparison, a clear idea of the development and the differences between the systems is necessary. Working from the assumption that in Germany as well as the UK (even though the second channel might not be fully developed in the UK) the industrial relations systems are made up of two channels, one being trade unions and the second other, often statutory, means of worker representation, a short history of trade unions and collective agreements will be presented in Chapter I, while Chapter II will be devoted to the second channel.

An historical overview over the development of trade unions, collective agreements and the different historical issues, fights and problems is necessary in order to understand where industrial relations are coming from and where they might be going. It is also necessary in order to fully understand and appreciate the differences between the systems and the different responses to EC law to be laid out in the following chapters. Such an overview will be provided in this chapter.

The time period covered is from 1945 to about 1984 with a short overview added to developments in the UK after 1984. The reasons for this are that, first, for German unions the Second World War marked a deep cut with a virtually fresh start in 1945. Secondly, the early 1980s in both countries not only mark a shift towards more conservative politics under respectively Thatcher and Kohl, from this time on also European influences are more clearly to be observed. These are dealt with in a different

chapter, so the early 1980s make a convenient close. The year 1984 was chosen because major strikes were taking part in both countries in that year. However, since consecutive years and especially the election of a Labour Government in 1997 after nearly 20 years of Conservative rule have brought about a change in industrial relations policy in the UK, a short overview of these developments will be given.

1945 - 1950

United Kingdom

The British system of industrial relations adheres to the principle of voluntarism, and, true to this, state intervention into the field of collective bargaining was not wished for by the unions¹.

Therefore trade union leaders were prepared to accept voluntary wage restraint in exchange for other benefits, but opposed all attempts by government to impose statutory restraints.

Consequently, TGWU General Secretary Bevin relied on the Conditions of Employment and National Arbitration Order (Order 1305) of 1940 during his time as Minister for Labour under the 1940 coalition Government rather than imposing statutory wage restraints (as demanded by the Treasury). The order rendered strikes and

¹ Alan Campbell, Nina Fishman, John McIlroy, *British Trade Unions and Industrial Politics – The Post-War Compromise, 1945-64*, Aldershot 1999, p. 77f.

Therefore, they usually opposed any proposals for a national wage policy. Despite the tradition of voluntarism, however, NUVB and AEU demanded a statutory minimum wage at the 1946 Trade union congress. Given its antagonism to the voluntarism idea and the fact that the proposal was rated as ‘naïve’ by speakers of the General Council, the margin by which it was voted down was surprisingly narrow

(Campbell et. al. cit. opp. p. 77f.)

lock-outs illegal and introduced compulsory arbitration; its application, however, was only possible with the consent of the TUC which led to a cautious use by the Government².

In 1948, the Labour Government secured the TUC's support "for a voluntary policy on wage restraint in exchange for commitment on retaining food subsidies"³ in what turned out to be a short-lived agreement. Devaluation and inflation as a result of the Korea War soon drove prices up. Labour demand in industries like engineering rose and the rise in unions' bargaining power turned opinion against wage restraints. Therefore, the Trade Union Congress voted (albeit with a small majority) in September 1950 against incomes policies⁴ and wage restraints came to an end⁵. However, industrial relations continued to be characterised by "a policy of concession and compromise" under moderate leaders like Arthur Deakin (TGWU) and Willi Lawther (NUM)⁶.

² Alan Campbell, Nina Fishman, John McIlroy, *British Trade Unions and Industrial Politics – The Post-War Compromise, 1945-64*, Aldershot 1999, p. 76; Sid Kessler, Fred Bayliss, *Contemporary British Industrial Relations*, 3rd Edition, London 1998, p. 2; M. A. Hickling, *Citrine's Trade Union Law*, 3rd Edition, London 1967, p. 25.

Not only declaring, instigating or inciting others to strike, but also taking part in a strike was illegal and presented a criminal offence. Furthermore, the order also implemented some kind of legal enforceability of collective agreements as employers were obliged to observe "‘recognized terms and conditions’ of employment established by means of negotiation or arbitration by the representatives of substantial proportions of employers and workers employed in the trade or industry in the district". (Hickling, cit. opp., p. 25)

³ Alan Campbell, Nina Fishman, John McIlroy, *British Trade Unions and Industrial Politics – The Post-War Compromise, 1945-64*, Aldershot 1999, p. 78; Hugh Armstrong Clegg, *The System of Industrial Relations in Great Britain*, 3rd Edition, Oxford 1976, p. 414.

⁴ Alan Campbell, Nina Fishman, John McIlroy, *British Trade Unions and Industrial Politics – The Post-War Compromise, 1945-64*, Aldershot 1999, p. 78; W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 198; Sid Kessler, Fred Bayliss, *Contemporary British Industrial Relations*, 3rd Edition, London 1998, p. 3.

⁵ Alan Campbell, Nina Fishman, John McIlroy, *British Trade Unions and Industrial Politics – The Post-War Compromise, 1945-64*, Aldershot 1999, p. 78.

⁶ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 198.

Germany

The German trade union movement had been destroyed in 1933, and so German unions in 1945 had, unlike their British counterparts, the obligation, but also the chance, to a downright reorganisation.

When starting to rebuild union-structures, unionists agreed that the new union movement should no longer be divided along political or union-political lines⁷. The allied forces had banned all political activities, thus requiring non-political unions⁸; another reason was the destruction of unions under Hitler, for it was believed that a unified union movement could have resisted more effectively. Furthermore, in opposition against Hitler unionists had worked together, an experience that obliterated former political divisions and created a base of trust that facilitated the building up of a politically unified movement⁹.

However, initially unionists disagreed about the form the new movement should take.

Right after the collapse of the Third Reich, a significant number of unionists had

⁷ Michael Fichter, *Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949*, Köln 1990, p. 20.

In the immediate aftermath of the war, works councils played an important role in the rebuilding of the union movement. At first, establishments were in fact governed by works councillors and works councils presented the primary organisation of workers. The aim of the councils was the development of a strong and powerful union movement and later on many councillors found their place in union bureaucracy. The importance of councils diminished with the emergence of organisational structures in enterprises, administration and especially unions, since neither occupying powers nor union officials were willing to allow a “dual power” system of unions and strong councils (Theo Pirker, *Die blinde Macht – 1945 – 1952: vom 'Ende des Kapitalismus' zur Zähmung der Gewerkschaften*, München 1960, p. 32).

⁸ Michael Fichter, *Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949*, Köln 1990, p. 20.

⁹ Michael Fichter, *Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949*, Köln 1990, p. 35; Franz Spliedt, *Die Gewerkschaften: Entwicklungen und Erfolge – Ihr Wiederaufbau nach 1945*, Hamburg 1947, p. 72.

favoured a centralised *Einheitsgewerkschaft*; that is, a union organisation in the form of a single, strong union for all workers, regardless of enterprise or occupation, encompassing a number of industry and occupational groups¹⁰; the idea resulting from the collective antifascist battle of Christians, social democrats and communists¹¹. The principle of *Einheitsgewerkschaft* was seen as part of their struggle for an anti-capitalist realignment¹² and unions simply lacked resources, especially in smaller communities, to facilitate a differentiated union structure with a number of industrial unions. Additionally, in the post-war confusion, the specific interests of individual branches or industries were not prevalent since the economic and social emergency affected all. Finally, a single organisation was perceived to exercise the most power¹³. Hans Böckler, later first chairman of the DGB¹⁴, strongly backed such a single organisation, arguing in 1945 that reconstruction would only be possible with a collaboration of all¹⁵.

¹⁰ Hermann Weber, Siegfried Mielke, Quellen zur Geschichte der deutschen Gewerkschaftsbewegung im 20. Jahrhundert – Band 6: Organisatorischer Aufbau der Gewerkschaften 1945 – 1949, Document 11, p. 108; Michael Fichter, Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949, Köln 1990, p. 38.

¹¹ Theo Pirker, Die blinde Macht – 1945 – 1952: vom 'Ende des Kapitalismus' zur Zähmung der Gewerkschaften, München 1960, p. 53.

¹² Michael Fichter, Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949, Köln 1990, p. 36.

¹³ Michael Fichter, Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949, Köln 1990, p. 38f.

¹⁴ Deutscher Gewerkschaftsbund – German Trade Union Federation

¹⁵ Hermann Weber, Siegfried Mielke, Quellen zur Geschichte der deutschen Gewerkschaftsbewegung im 20. Jahrhundert – Band 6: Organisatorischer Aufbau der Gewerkschaften 1945 – 1949, Document 11, p. 108; Michael Fichter, Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949, Köln 1990, p. 38.

The “Free Socialist Union” in Hamburg was founded as early as May, 11th 1945 and, being a result of a combined initiative of social democrats and communists, constituted a political entity that also administrated union functions. Its self-perception was to be the sole representative of Hamburg's working class by unifying political and union struggle, thus following the idea of *Einheitsgewerkschaft* rather than *Industriegewerkschaft*. However, it was short-lived and cancelled in favour of autonomous unions based on individual industries, trades or establishments in June 1945. This first move against the idea of *Einheitsgewerkschaft* was based on resentments amongst members against the concept and the

Others favoured organising along industry lines; that is, only one union shall represent all employees in an enterprise and in fact, only one union shall represent an industry¹⁶, visualising an effective representation of members' interests and safeguarding of internal union democracy¹⁷. It seemed obvious to unionists that a divided union movement with unions mainly focusing on the interests of individual occupations and industrial sectors would not be able to influence the political and economical reconstruction in a direction they approved of¹⁸.

The western allies opposed the idea of *Einheitsgewerkschaft* and in early 1946 those German unionists that favoured autonomous industrial unions under a federal umbrella organisation had got the upper hand¹⁹. When the Allied Control Council passed

combination of union and political functions, less on intervention by the military government (Fichter, cit. opp., p. 39f.; Theo Pirker, *Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 – 1952 – Vom 'Ende des Kapitalismus' zur 'Zähmung der Gewerkschaften'*. München 1960 p. 26, 31; Franz Spliedt, *Die Gewerkschaften – Entwicklungen und Erfolge: Ihr Wiederaufbau nach 1945*, Hamburg 1947, p. 92ff.)

¹⁶ Michael Fichter, *Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949*, Köln 1990, p. 23f.

That idea actually originated earlier than 1945. The Leipzig convention of 1922 agreed on a resolution that stated that only industrial unions would be in a position to oppose an industrial enterprise that on their part more and more comprise various branches. Therefore the unions' struggle for better wages and condition would be seriously impeded if various branch organisations compete in an industry or oppose a single entrepreneur or group of entrepreneurs in collective bargaining (Franz Spliedt, *Die Gewerkschaften: Entwicklungen und Erfolge – Ihr Wiederaufbau nach 1945*, Hamburg 1947, p. 64).

¹⁷ Michael Fichter, *Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949*, Köln 1990, p. 40; Theo Pirker, *Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 – 1952 – Vom 'Ende des Kapitalismus' zur 'Zähmung der Gewerkschaften'*. München 1960 p. 37.

¹⁸ Michael Fichter, *Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949*, Köln 1990, p. 36.

¹⁹ Michael Fichter, *Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949*, Köln 1990, p. 40; Theo Pirker, *Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 – 1952 – Vom 'Ende des Kapitalismus' zur 'Zähmung der Gewerkschaften'*. München 1960 p. 37.

Allocation No. 31 in November 1946 on “Development of Union Federations”, allowing union federations on a larger scale but imposing the restriction that unions had to be organised as industrial unions, the decision against the *Einheitsgewerkschaft* was taken²⁰.

The process of rebuilding was not centrally organised, but happened independently within the different zones of occupation, influenced by different demands and ideas of the allied powers. While inter-sectoral communication of unions was not possible; similar experiences made sure that rebuilding in the western sectors followed similar lines²¹. Even though the allies regarded unions as a way to educate the German people towards democracy, German unionists later complained about difficulties raised by the occupying forces. Unionists held they had not been able to rebuild unions as they wished and as it would have been necessary. In the first few months, contacting other unions had been illegal. The British military government had restricted rebuilding by devising a three-step plan for unions' development: in the first phase, unionists interested in founding a union could obtain the approval of the military government and were then allowed to hold meetings. In the second phase, accreditation to collect membership fees was granted and the third and final phase allowed free development and therefore federations with unions beyond the local sphere²². The Americans, based on their belief that union development needed to start from the bottom up, restricted union organisation to the local sphere and even banned federations of local unions²³.

²⁰ Theo Pirker, *Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 – 1952 – Vom 'Ende des Kapitalismus' zur 'Zähmung der Gewerkschaften'*. München 1960 p. 45.

²¹ Franz Spliedt, *Die Gewerkschaften: Entwicklungen und Erfolge – Ihr Wiederaufbau nach 1945*, Hamburg 1947, p. 65.

²² Theo Pirker, *Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 – 1952 – Vom 'Ende des Kapitalismus' zur 'Zähmung der Gewerkschaften'*. München 1960 p. 27f.

²³ Theo Pirker, *Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 –*

The fact that unions in the Russian sector were build up from top to bottom and therefore had a headstart in terms of regional and sectoral organisation led, together with the growing differences between the allied powers, the western sectors to relax the restrictions little by little in order to prevent workers from sympathising with the Russian government²⁴.

After the structure of the future union movement had been determined and the western allies relaxed their restrictions, unions started organising on a regional and eventually national scale. First steps towards inter-sectoral cooperation had already been taken in 1946, when the World Trade Union Congress had called for an inter-sectoral trade union conference in Germany, maintaining that only a unified German union organisation could become member of the WTUC. A first meeting of German union representatives with union functionaries from abroad and WTUC-representatives took place in November 1946, followed by the first inter-sectoral conference in Hanover in December 1946. These conferences were intended to take place every two months and had as their aim the development of common union structures²⁵.

On a political level, the American and British military governments announced the implementation of a combined administration of their sectors starting from January 1st, 1947. Unionists in the American sector took this as a signal to start organising a bi-sectoral union movement; however, British sector unions initially were opposed, arguing that a bi-sectoral unification would present a partition wall between West and East. They also advocated the nationalisation of mining, iron- and steel industry in the

1952 – Vom 'Ende des Kapitalismus' zur 'Zähmung der Gewerkschaften'. München 1960 p. 37.

²⁴ Theo Pirker, Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 – 1952 – Vom 'Ende des Kapitalismus' zur 'Zähmung der Gewerkschaften'. München 1960 p. 62f.

²⁵ Theo Pirker, Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 – 1952 – Vom 'Ende des Kapitalismus' zur 'Zähmung der Gewerkschaften'. München 1960 p. 66f.

Ruhr district, fearing that the Americans would try to hinder this and would put more pressure on union politics²⁶. Unions therefore decided on a union council administering bi-sectoral tasks and issues of a future federation rather than unification, hoping for an all-German movement. It soon became obvious, however, that the differences between the allied forces were such that a unified Germany was unlikely to happen. Complete political and economical federation of the western sectors and its integration into the capitalist western world became immanent and, since a union council could only yield little influence, in 1948 unions in the British sector eventually agreed to prepare a unification of British and American sector union federations; still hoping (and this hope was reflected in the declaration that allowed joining of the Russian and French sector unions) to one day build a federation including all of Germany²⁷. However, by now this was highly unlikely; not least because the Americans had made it very clear that they would only agree to a unification with the eastern sector trade union federation under certain obligations they knew it could not fulfil; namely economical cooperation between the sectors and a democratically structured union movement. The eastern federation eventually left the inter-sectoral conferences in August 1948.²⁸

²⁶ Michael Fichter, *Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949*, Köln 1990, p. 76.

²⁷ Michael Fichter, *Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949*, Köln 1990, p. 77f.

The sixth inter sectoral conference in October 1947 had decided to call a general German union congress for spring 1948, asking a committee made up from union representatives of every sector and Berlin to present basic principles and a constitution for a German trade union congress (including unions from the eastern sector); however, these guidelines failed to be passed by the conference. Fritz Tarnow, who had been an important figure in the union movement in the Weimar Republic and also played an important role in the re-building of unions after 1945, had presented a “declaration of principles” to be passed alongside the guidelines that included definitions of “democracy” leading to (and in fact being intended to) the exclusion of the unions of the eastern sector (Theo Pirker, *Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 – 1952 – Vom 'Ende des Kapitalismus' zur 'Zähmung der Gewerkschaften'*. München 1960 p. 72ff.)

²⁸ Michael Fichter, *Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949*,

Incorporating the French sector unions was difficult, too; but in autumn 1948 the French military government eventually allowed negotiations about a three-sectoral federation and finally, in October 1949, the founding conference of the DGB could take place in Munich. Hans Böckler was elected as first chairman of the new federation, which was designed as a federation of 16 (then newly founded) industrial unions. It is not a mere federation but also administers functions (like legal protection and organising campaigns) traditionally connected with individual unions²⁹.

In 1948, unions had more members than in 1933³⁰ but immediately after the war and in the first years of the Federal Republic, they had to struggle with grave economical problems. Unions were permitted to conduct *Tarifvereinbarungen*³¹, but there was no room for a regular policy of collective agreements or even wages; rather, the Allied Control Council (ACC) had issued a pay freeze in May 1945 that was not abolished until November 1948³². When prices rose dramatically after the currency reform of

Köln 1990, p.78f.

²⁹ Michael Fichter, *Einheit und Organisation – der Deutsche Gewerkschaftsbund im Aufbau 1945 – 1949*, Köln 1990, p.79f; Theo Pirker, *Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 – 1952 – Vom 'Ende des Kapitalismus' zur 'Zähmung der Gewerkschaften'*. München 1960 p. 144.

³⁰ Theo Pirker, *Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 – 1952 – Vom 'Ende des Kapitalismus' zur 'Zähmung der Gewerkschaften'*. München 1960 kp. 33.

³¹ Literally tariff acknowledgement – agreements between workers' organisations and employers on wages; however, less extensive than ordinary collective agreements.

³² Tarifarchiv der Hans-Böckler-Stiftung, Stationen der Tarifpolitik – Die 50er Jahre: Tarifpolitik im Zeichen des Wirtschaftswunders, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-68F72AED/hbs/hs.xsl/559_16598.html, last accessed September 30th, 2005; Tarifarchiv der Hans-Böckler-Stiftung, Die wichtigsten Tarifbewegungen und -abschlüsse, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-68F72AED/hbs/hs.xsl/559_16564.html, last accessed September 30th, 2005.

Union pressure prompted the ACC to prohibit wages below 50pf an hour; to raise wages in industries that were neglected by the wage policy of the Nazis; to suit piece wages to new conditions of production; and to raise the wages of women and young workers to the men's level – when they performed the same work and performance. All new wages had to be approved by the German Administration for Labour and could not result in a increase to the wage rate. Full freedom of

1948, many wages fell under the margin of subsistence³³. In the American sector, General Clay had announced in July 1948 that free prices require free wages and stressed that “free wages” included a right to strike; however, unions and their members tried to tackle the problem of falling real wages by attacking prices, and asking for wage-rises on a political level³⁴. The wage stop was lifted in October 1948 but unions still rather relied on political protest forms than strikes. In November 1948, the union council called for a demonstration in the form of a one-day break to emphasise their demands, including rationing in the food sector and elements of a planned economy as well as socialisation of basic industries and credit association. However, they failed to make clear what they would do if their demands were not met. Additionally, negotiation with the military governments had the results that some important industries were not

collective agreements was not restored until the abolishment of the pay freeze on November 3rd, 1948. Thereafter, the *Tarifordnungen* of the Third Reich were gradually replaced by collective agreements and eventually the Law on Collective Agreements (*Tarifvertragsgesetz*) came into force in April 1949, the passing of the Constitution in May 1949 ensured the Freedom of Coalition. Standard hourly wages at this time ranged between 59 Pfennig for workers in agriculture and 1.77Mark in the chemical industry, monthly wages were between 175 mark for butchers and 531 Mark in the chemical industry with lower rates or deductions for women, wages f women were also often laid down in special “women wage groups”. The Industrial High Court declared those wage groups illegal in 1955; however, they were to be removed from collective agreements only very slowly over the next years resp. decades (Tarifarchiv der Hans-Wackler-Stiftung, Die wichtigsten Tarifbewegungen und -Abschlüsse, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-68F72AED/hbs/hs.xsl/559_16564.html, last accessed September 30th, 2005.)

³³ Theo Pirker, *Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 – 1952 – Vom 'Ende des Kapitalismus' zur 'Zähmung der Gewerkschaften'*. München 1960 p. 102f, 105.

³⁴ Theo Pirker, *Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 – 1952 – Vom 'Ende des Kapitalismus' zur 'Zähmung der Gewerkschaften'*. München 1960 kp. 102f, 105.

In August 1948 unions demanded wage rises and an official limit on prices, to be controlled under union-cooperation. If necessary, government control of the economy should be re-introduced for those vital goods and foodstuffs not available in sufficient amounts (Parker, chit. opp., p. 103).

affected by the “demonstration” at all and that its duration was restricted to a few hours³⁵.

1950 – 1960

United Kingdom

Restrictive wage policies continued in the 1950s.

In 1951 the Churchill Government was elected and hoped to link wage increases to productivity increases³⁶. However, it had only a very small majority in Parliament³⁷ and Churchill himself hoped “to work with the trade unions in a loyal and friendly spirit”³⁸. Ideas for wage restraints were therefore soon abandoned and in some cases, for example engineering and shipbuilding, wage rises above the cost of living were given with government approval³⁹. However, unions tried to keep up good relations by maintaining the moderate politics practised under the preceding Labour Government⁴⁰.

³⁵ Theo Pirker, *Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 – 1952 – Vom 'Ende des Kapitalismus' zur 'Zähmung der Gewerkschaften'*. München 1960 kp. 104ff.

³⁶ Henry Pelling, *A History of British Trade Unionism*, 5th Edition, London 1992, p. 223.

³⁷ Henry Pelling, *A History of British Trade Unionism*, 5th Edition, London 1992, p. 223; W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 198.

³⁸ Alan Campbell, Nina Fishman, John McIlroy, *British Trade Unions and Industrial Politics – The Post-War Compromise, 1945-64*, Aldershot 1999, p. 78.

³⁹ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 198ff.; Henry Pelling, *A History of British Trade Unionism*, 5th Edition, London 1992, p. 223.

⁴⁰ Henry Pelling, *A History of British Trade Unionism*, 5th Edition, London 1992, p. 223.

A statement of the General Council of the TUC declared: “Since the Conservative administration of pre-war days the range of consultation between Ministers and both sides of industry has considerably increased, and the machinery of joint consultation has enormously improved. We expect of this government that they will maintain to the full this practice of consultation. On our part

The 1957 Conservative Government under Macmillan introduced a Council on Prices, Productivity and Incomes which was met with very little enthusiasm among employers' associations or trade unions – the Council statement that the best remedy against inflation was rising unemployment, did nothing to warm the unions to it⁴¹. While the Court of Appeal had emphasised in *National Coal Board v Galley*⁴² that collective agreements (unless otherwise intended by the parties) are not legally enforceable, the Terms and Conditions of Employment Act 1959 contained a provision that provided some enforceability of agreements⁴³. The case also established that strikers are liable in damages to their employers; however, each worker was only held to be “liable for the damage caused by his own breach, not that by others, even if they had all acted in concert”⁴⁴.

Germany

The 1950s witnessed a debate on reduction in working time and the beginning jurisdiction of the *Bundesarbeitsgericht*⁴⁵ on strikes.

Once the economic situation had improved, weekly hours went up to pre-war standards of between 47.5 and 48.6 h. A main objective of German unions, especially in the

we shall continue to examine every question solely in the light of its industrial and economic implications”.

However, the willingness to play along with wage policies was partly due to anti-communist sentiments, as unions tried to undermine the influence of communist unions by regularly (and with considerable majorities) voting down their proposals to refuse all kind of wage restraints (Selling, chit. opp., p. 223f.)

⁴¹ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 203.

⁴² *National Coal Board v Galley* [1958], 1 All ER 91.

⁴³ M. A. Hickling, *Citrine's Trade Union Law*, 3rd Edition, London 1967, p. 27f, p. 651f.

⁴⁴ Considerable effort was spend to explain why in this special case an agreement was meant to be legally binding.

⁴⁵ Federal Industrial Court. In the following referred to as BAG.

second half of the 1950s, was therefore a reduction of working hours, soon supported by the Social Democrats, then in opposition⁴⁶. The employers' associations considered reductions in working time possible if following an increase in productivity⁴⁷.

German unions, unlike their British counterparts would have done, preferred to reduce working time by changes to the law. However, eventually a series of agreements reached by the metal-workers' union IG Metall between 1956 and 1960, acting as model agreements that would be adapted by other industries, provided the break-through for a wide distribution of the 40-hour week⁴⁸.

This was mostly achieved without resort to industrial action. Since the *Wirtschaftswunder*, German unions are regarded as more peaceful than their counterparts elsewhere and the 1950s and 1960s indeed were not only peaceful when compared with Italy, France or England, but also compared to earlier periods of German

⁴⁶ Michael Schneider, *Kleine Geschichte der Gewerkschaften – Ihre Entwicklung in Deutschland von den Anfängen bis heute*, Bonn 1989, p. 281f.

⁴⁷ Michael Schneider, *Kleine Geschichte der Gewerkschaften – Ihre Entwicklung in Deutschland von den Anfängen bis heute*, Bonn 1989, p. 281ff.

In the following time different unions achieved different results. In the food and catering trade the IG Nahrung – Genuß – Gaststätten achieved the 40 hour week already in 1959, in the metal industry it took till 1967.

⁴⁸ Michael Schneider, *Kleine Geschichte der Gewerkschaften – Ihre Entwicklung in Deutschland von den Anfängen bis heute*, Bonn 1989, p. 282f; Tarifarchiv der Hans-Böckler-Stiftung, Die wichtigsten Tarifbewegungen und -abschlüsse, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-68F72AED/hbs/hs.xsl/559_16564.html, last accessed September 30th, 2005.

The reduction in working-time was, like the increase in holidays, achieved by collective agreements; however, only the achievements in holidays were (at this time) secured by law. In 1963 the *Bundesurlaubsgesetz* (National Law on Holidays) provided for 3 weeks holidays per year; however, the average holidays provided by collective agreements soon rose to 4 weeks at the end of the 1960s and to about 5 weeks in 1975, showing that legal rights still allow for agreements providing for better conditions. The metal workers achieved a reduction from 48 to 45 weekly hours in 1956 and in the following time different unions achieved different results. In the food and catering trade the IG Nahrung – Genuß – Gaststätten achieved the 40 hour week already in 1959, while in the metal industry it took till 1967. Nevertheless, by 1973 only about 69% of employees had an agreed standard working week of 40h, and it was not until 1978 that a percentage of above 90% was reached (Michael Schneider, cit. opp. p. 281ff; Tarifarchiv der Hans-Böckler-Stiftung, cit. opp.).

history. This, however, does not mean that German unions are “toothless tigers”. Rather, the then prevalent extremely favourable economic situation plus good union organisation resulted in a convincing *Drohpotential*⁴⁹, enabling unions to get their demands met without industrial action⁵⁰.

Peaceful industrial relations have also been influenced by the jurisdiction of the BAG, which developed detailed regulations regarding the legality of strikes⁵¹. It decided in a number of decisions in 1955⁵² that a strike that was not conducted about issues that could be regulated by collective agreement is illegal⁵³ and could constitute an intrusion

⁴⁹ Literally ‘threatening potential’: the ability to threaten convincingly.

⁵⁰ Michael Schneider, *Kleine Geschichte der Gewerkschaften – Ihre Entwicklung in Deutschland von den Anfängen bis heute*, Bonn 1989, p. 285.

⁵¹ Michael Schneider, *Kleine Geschichte der Gewerkschaften – Ihre Entwicklung in Deutschland von den Anfängen bis heute*, Bonn 1989, p. 285.

The right to strike is today generally derived from the constitution, however, as it is not laid down *expressis verbis* most of the rules regarding strikes and the constitutional right to strike itself have been developed by the courts, notably the BAG. Before the BAG did so a right to strike could be derived from the historical development after 1869, especially § 152 I GewO, and a general legal conviction (the *Reichsarbeitsgericht* generally assumed such a right) but also from § 49 II 3 BetrVG.

According to the rules laid down by the BAG, a strike is legal when it is conducted with the aim of concluding a collective agreement. It therefore must have as its aim issues that are capable of regulation by a collective agreement; political, sympathy- and solidarity strikes are illegal, as are strikes that are carried out to demonstrate a general dissatisfaction with employers’ behaviour. Furthermore, only strikes conducted by actors that can be parties to a collective agreement (trade unions, employers and employers’ associations) are legal; wildcat strikes without unions support are therefore not permitted. Strikes are forbidden during the *Friedenspflicht*, that is, the peace duty that accompanies every collective agreement in Germany during its validity. Finally, the BAG held that industrial action has to be conducted under restriction of commensurability.

(Schneider, cit. opp. p. 285; Günter Schaub (Ed.), *Arbeitsrechts-Handbuch – Systematische Darstellung und Nachschlagewerk für die Praxis*, 11th Edition, München 2005, p. 1867ff., § 193, Rn. 7ff.)

⁵² BAG, May 4th, 1955, 1 AZR 493/54.

⁵³ It was held that even one illegal aim of the strike would render the whole strike illegal (BAG, May 4th, 1955, 1 AZR 493/54.)

into a commercial enterprise and thus entitle to damages according to § 823 I BGB⁵⁴. It held that a strike without union involvement was illegal by deciding that a *sozialadäquat*⁵⁵ strike that had started without a union calling it would be legitimate once the union approved of it and declared to continue it⁵⁶.

Most importantly, the *Große Senat* of the BAG⁵⁷ decided, against the then prevailing opinion in legal literature and jurisprudence, that legitimate strikes did not constitute breaches of contract⁵⁸. In a strike, workers would deliberately, consciously and solidary act together, making it a collective action. The stoppage of the individual worker therefore had to be considered as part of a collective action that has to be judged according to collective principles of employment law but not according to contractual obligations, which are only meant to govern individual actions. Strikes are, under certain circumstances, legitimate under collective principles; therefore, taking part in a

⁵⁴ § 823 I BGB (*Bürgerliches Gesetzbuch* – German Civil Code) is the main norm governing *unerlaubte Handlungen*; that is tortious acts or civil offences. It is therefore one of the main bases for claims of damages.

⁵⁵ Literally ‘social acceptable’. According to the BAG, a strike is socially acceptable when it neither interrupts the peace duty, nor constitutes, according to its means, its aims or the disproportionality of means and aims, socially inappropriate action (for example a direction intervention into employers’ enterprises). An immoral strike (immorality as defined in § 826 BGB) would also not be socially acceptable.

(BAG, *Großer Senat*, January 28th, 1955, GS 1/54).

⁵⁶ BAG, September 5th, 1955, 1 AZR 480/54.

⁵⁷ BAG *Großer Senat*, January 28th, 1955, GS 1/54.

The *Große Senat* is a Senate of the Federal Employment Court comprised of members of its two ordinary senates and lay judges from the employers’ as well as the employees’ side. If a Senate plans to deviate from a decision of another Senate or the *Großen Senates*, an appeal to the *Große Senat* is possible. An appeal is also possible in legal decision of fundamental importance if necessary for the development of the law and the safeguarding of consistent jurisdiction. In the present case the second choice was used (see § 45 ArbGG).

⁵⁸ While not deciding whether there is a constitutional right to strike, the *Große Senat* nevertheless emphasised the circumstances under which a strike would be socially adequate and lawful (BAG, GS 1/54, para 32ff.; compare footnote 28).

(legitimate) strike would be legitimate as well⁵⁹. This meant that employers could not dismiss individual employees without notice; however, they did have the right to a ‘terminating lockout’. While suspending lockouts are possible, they will often be, especially when used as a defensive measure against a strike, pointless, since, according to the new doctrine of the BAG, the contracts of employment have already been suspended by the strike. According to the principle of *Kampfparität*⁶⁰, the risks of an industrial dispute must be divided equally between employers and employees. Merely suspending lockouts, however, would relieve the employees’ side of the risk of losing their jobs and would therefore constitute a risk-division in their favour; considering that employers bear the risk of losses and, eventually, of economic breakdown. Therefore, employers must have the right to use terminating lockouts; moreover, the *Große Senat* held that lockouts normally, if no other intention is apparent, will be terminating⁶¹. It also held that there is no general duty to reinstate after a lockout; rather, the decision whether and which employees are reinstated lies in the employers’ discretion. A general duty to reinstate would shift the *Kampfparität* in favour of employees and render a terminating lockout pointless. However, employers have to use fair discretion when reinstating, that is, they are not allowed to act obviously improper⁶².

Even though strikes would not constitute breaches of contract, they were made more risky by generously allowing lock outs. Strikes are always connected with a risk, but from today’s perspective it seems as if the risk distribution turned out to the disadvantage of unions. After all, in addition to the economic risk of not getting paid during the conflict (interestingly, the economic risk of the *employer* was used to justify

⁵⁹ BAG, GS 1/54, para 47ff.

⁶⁰ *Kampfparität* literally means ‘battle parity’ and is a very important concept used by the BAG when it comes to judge actions in a strike. It entails that all measures in a strike are judged in regard to if they give one side an unfair advantage over the other.

⁶¹ BAG, GS 1/54, para 62ff.

⁶² BAG, GS 1/54, para 86ff.

the use of lockouts), employees had now also bore the risk of not being reinstated after a lockout; However, one has to take the circumstances of the time into consideration: in 1955, Germany had full employment; a dismissal, especially of skilled workers, therefore might have actually been more harmful to the employer who then had to seek for adequate substitution; while workers had little problems with finding new and often better employment. Taking this into account, the judgement does appear to maintain the *Kampfparität*.

The right to lock-out was further consolidated with two more decisions: in 1957 the BAG held that it was legitimate to lock-out workers who didn't participate in the dispute because of holiday or illness⁶³ and in 1960 it decided that a lock-out did not need to be done in a single act but could be undertaken successively as long as it was based on the same decision by the employer⁶⁴.

Employers' position in industrial conflict was strengthened, so from the mid-1950s strikes were used only in highly controversial and fundamental issues⁶⁵. Most remarkable in this period is probably the 16-week strike conducted in 1956/57 by IG Metall in Schleswig-Holstein for longer holidays and sick pay for blue-collar workers⁶⁶.

⁶³ BAG from September 27th, 1957, AP Nr 6 zu Artikel 9 GG Arbeitskampf.

⁶⁴ BAG from October 14th, 1960, BAG 10, S. 88ff, AP Nr. 10 zu Artikel 9 GG Arbeitskampf.

⁶⁵ Michael Schneider, *Kleine Geschichte der Gewerkschaften – Ihre Entwicklung in Deutschland von den Anfängen bis heute*, Bonn 1989, p. 285.

The numbers of employees participating in strikes and days lost in a strike fell from 1.1 million workers and 6.3 million days between 1950 and 1955 to 33,200 workers and 3.6 million days between 1956 and 1961 (Schneider, ct. opp. p. 285).

⁶⁶ Michael Schneider, *Kleine Geschichte der Gewerkschaften – Ihre Entwicklung in Deutschland von den Anfängen bis heute*, Bonn 1989, p. 286f.

An important difference to strikes in Great Britain can be seen here, as this strike indirectly forced parliament to legislate the factual equality of blue- and white-collar workers by providing equal sick pay rights to both groups. The "Law on sick pay" (*Gesetz zur Lohnfortzahlung im Krankheitsfall*)

The union won, but had to pay damages. It had held a strike ballot before the end of arbitration and the BAG decided that this constituted an offensive measure and thus a breach of the *Friedenspflicht*⁶⁷.

While their British counterparts had to deal with policies of wage restraint, German unions enjoyed free collective bargaining and could concentrate on issues such as the reduction of the working week. However, they had to deal with legal restraints of industrial action soon after the war. With regard to strikes, therefore, the system of legalism worked to the disadvantage of German unions, with numerous obstacles and liabilities confining the constitutional right to strike.

1960 - 1970

United Kingdom

Wage policies continued to be important.

In the summer of 1961, prompted by pressure on sterling, the government declared a “pay pause” for public service employees and those covered by wage councils without consulting the unions. The mark for future pay rises was set at 2.5%⁶⁸ but this was soon to be undermined by a 9% pay rise for dockers after they threatened industrial action⁶⁹.

was passed, but not until 1970 was full equality achieved (Schneider, *opp. cit.*, p. 286f.).

⁶⁷ Michael Schneider, *Kleine Geschichte der Gewerkschaften – Ihre Entwicklung in Deutschland von den Anfängen bis heute*, Bonn 1989, p. 286f.; however, prevailing opinion seems to have changed so that possibly ballots are not regarded as offensive measures anymore (http://www.jura.uni-bielefeld.de/Lehrstuehle/Rolfs/Begleitmaterial/SS_2002/Arbeitsrecht/ArbeitskampfR2.pdf, last checked November 2nd, 2005)

⁶⁸ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 207f; Alan Campbell, Nina Fishman, John McIlroy, *British Trade Unions and Industrial Politics – The Post-War Compromise, 1945-64*, Aldershot 1999, p. 79.

⁶⁹ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 207f.

The pay pause was to end in March 1962 and even though a general sense of need for a national incomes policy began to emerge, strong opposition showed that the approach to income control needed to be more flexible. The Conservative Government discussed a “guiding light” of 2.5% increase for the rest of the year and union representation on the new established National Economic Development Council (NEDC) with the TUC⁷⁰. Although eager to not be responsible for any policy of wage restraint, union leaders did agree to take part in it, but only under the condition that wages and other collective bargaining issues should not be discussed⁷¹.

The government also set up a National Incomes Commission to formulate an independent opinion on major wage claims. The TUC was asked to join, but, since it was obvious that this was an attempt to get the unions' support for wage restraint, declined. The Commission never succeeded in winning the support of either employers or trade unions, which still opposed government intervention and preferred to rely on collective bargaining instead⁷². It never had much influence and vanished after Labour regained office in 1964⁷³.

Labour soon established a new Department of Economic Affairs, concerned with incomes policy⁷⁴. Unemployment had fallen to about 300,000, giving unions the necessary power to negotiate improvements. Many succeeded in achieving a working

⁷⁰ Henry Pelling, *A History of British Trade Unionism*, 5th Edition, London 1992, p. 245. The NEDC was set up “to examine the long-term prospects for growth in the economy and the processes for securing it” (Pelling, cit. opp. p. 245).

⁷¹ Alan Campbell, Nina Fishman, John McIlroy, *British Trade Unions and Industrial Politics – The Post-War Compromise, 1945-64*, Aldershot 1999, p. 80; Henry Pelling, *A History of British Trade Unionism*, 5th Edition, London 1992, p. 245.

⁷² W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 208.

⁷³ Henry Pelling, *A History of British Trade Unionism*, 5th Edition, London 1992, p. 245.

⁷⁴ Hugh Armstrong Clegg, *The System of Industrial Relations in Great Britain*, 3rd Edition, Oxford 1976, p. 418.

week of 40 hours. However, labour costs were outstripping output and unions, employers' associations and government signed a "Declaration of Intent on Productivity, Prices and Incomes" to improve productivity while George Brown's National Plan suggested a norm of 3-3.5% for wage rises to keep incomes growth in line with inflation, to be administered by a National Board for Prices and Incomes⁷⁵. Unions were split on the issue of incomes policy: some were in favour as long as prices would be restrained too, while others, particularly the craft unions, argued that giving up on collective bargaining would lead to a policy controlling wages but not prices. However, they were persuaded by the then General Secretary of the TUC, George Woodcock, to "submit any new wage claims to a TUC wage-claim vetting committee so that a system of 'early warnings of problems could be established'"⁷⁶.

However, inflation and poor economic performance were not the sole responsibility of unions and their wage claims. Rather, Governmental attempts to keep up full employment and develop a welfare state contributed to tax rises and public borrowing, which in turn led to pressure for higher wages and prices and a loss in competitiveness. Moreover, Germany, along with Japan, had recovered from the war and overtook Britain in terms of annual growth and world market share⁷⁷.

In 1964 the House of Lords decided in *Rookes v Barnard* that a threat to break a contract (or to induce such a breach) constituted a tort of intimidation⁷⁸. Since the legal

⁷⁵ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 210f.; Henry Pelling, *A History of British Trade Unionism*, 5th Edition, London 1992, p. 249.

Under certain circumstances (increases in productivity, exceptionally low pay or the need to animate recruitment) larger rises could be permitted (Pelling, cit. opp., p. 249).

⁷⁶ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 210f.

⁷⁷ John Mellroy, *The Permanent Revolution? - Conservative Law and the Trade Unions*, Nottingham 1991, p. 5.

⁷⁸ *Rookes v Barnard* [1964] AC 1129; Otto Kahn-Freund, *Labour and the Law*, 2nd Edition, London 1977, p. 232, 259.

immunity given by the Trade Disputes Act of 1906 that had removed trade unions' liability for "inducing a breach of contract of employment in contemplation or furtherance of a trade dispute" did not cover torts of intimidation by threatening a breach of contract, considerable unrest among unionists was caused⁷⁹. Additionally, not only the strikers themselves, but also union officials calling a strike or just acting as a mediator between would-be strikers and the employer could be subject to legal action for tort of conspiracy⁸⁰.

Unions lobbied for new legislation to overthrow the effects of the decision and in response Labour passed the 1965 Trades Disputes Act, intended to restore the law to the *status quo ante*. While it provided that a threat of breach of contract or to induce such a breach shall not be actionable⁸¹, strikes still constituted breaches of contract. At the same time, the Government set up the Donovan Commission to have a close look at the system of industrial relations⁸².

The Prices and Incomes Act 1966, agreed to by the TUC, imposed – for the first time – criminal sanctions on unions, union members and employers for breach of its terms. In return it was hoped that unions would get to play a more active role in economic planning⁸³, but all efforts of establishing incomes policies were unsuccessful; some

Employees generally didn't wish to terminate their contracts, rather, while intending to break them, they wished to keep "the contract alive for as long as the employers would tolerate the breach without exercising their right of rescission". (*Rookes v Barnard*), see also Lord Denning in *Stratford v Lindley* [1965] AC 269 at 285 (Richard Kidner, *Trade Union Law*, London 1979, p. 135).

⁷⁹ Otto Kahn-Freund, *Labour and the Law*, 2nd Edition, London 1977, p. 232; M. A. Hickling, *Citrine's Trade Union Law*, 3rd Edition, London 1967, p. 17, 28f., 623; W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 209;

⁸⁰ M. A. Hickling, *Citrine's Trade Union Law*, 3rd Edition, London 1967, p. 28f., 623.

⁸¹ M. A. Hickling, *Citrine's Trade Union Law*, 3rd Edition, London 1967, p. 30.

⁸² W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 209.

⁸³ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 211ff..

areas in fact experienced a wage explosion rather than a wage restraint⁸⁴.

In 1968, the Court of Appeal held in *Morgan v Fry*⁸⁵ that strike action suspended rather than terminated contracts of employment. Lord Denning emphasised that strikes would not, if sufficient notice was given, constitute breaches of contract, since that “would do away with the right to strike in this country”⁸⁶. While this understanding was held to be common before *Rookes v Barnard*, Lord Denning now was the only one to take this view. Since *Morgan v Fry* provided no authority in this matter, all strikes now constitute, regardless of any notice given, a breach of contract⁸⁷.

In 1969, *Ford Motor Co. Ltd v AUEW*⁸⁸ confirmed that collective agreements are normally not intended to be legally binding. Ford had advocated the binding nature of a series of collective agreements, while the unions prevailed with their arguments that “collective bargaining agreements are not intended to create legal relations unless, ... , the parties express a wish that they should do so”⁸⁹.

⁸⁴ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 219.

More strikes took place in the following years and claims for wage restraint weren’t helped by the fact that in some industries the shortage of skilled labour was such that orders had to be turned down (Fraser, cit. opp. p. 211ff.)

⁸⁵ Court of Appeal, *Morgan v Fry and others* [1968] 2 QB 710, June 27th, 1968

⁸⁶ *Morgan v Fry*, Judgement of Lord Denning. A note was held to be sufficient when it was “at least as long as the notice required to terminate the contract”; after all, “the men can leave their employment altogether by giving a week’s notice to terminate it. That would be a strike which would be perfectly lawful. If a notice to terminate is lawful, surely a lesser notice is lawful; such a notice that “we will not work alongside a non-unionist”.

(*Morgan v Fry*, Judgement of Lord Denning).

⁸⁷ Roger Rideout, *Rideout's Principles of Labour Law*, 5th Edition, London 1989, p. 325.

⁸⁸ *Ford Motor Co, Ltd v Amalgamated Union of Engineering and Foundry Workers and Others*, [1969], 2 QB 303.

⁸⁹ *Ford Motor Co. V AUEW*, paras 314, 329, 330; W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 219f.

Germany

In the first economic crisis after the war, German unions were confronted with policies of stability and wage restraint for the first time.

While the late 1960s were characterised by negative growth and a peak in unemployment of 3.1% in February 1967⁹⁰, the early 1960s were still marked by a favourable economic development with wage rises⁹¹ of about 30%, accompanied by a striking drop in industrial disputes; the strong economy allowed for wage rises without the need for industrial action⁹². However, conditions began to change. In 1963, the Federal Government first published guidelines for a wage policy, demanding a link to productivity. Pressure on unions increased with the slowing down of the economy and they failed to negotiate wage rises significantly higher than the rise in productivity⁹³.

⁹⁰ Karl Hardach, *The Political Economy of Germany in the Twentieth Century*, Berkeley 1980, p. 200; Michael Schneider, *Kleine Geschichte der Gewerkschaften – Ihre Entwicklung in Deutschland von den Anfängen bis heute*, Bonn 1989, p. 319ff..

⁹¹ Furthermore, collective agreements in the (early) 60s also brought a number of other improvements: for the first time holiday money was provided collective agreement; in wood processing in 1962; paper, metal and textiles industries followed in 1965, chemical industry and printing in 1966, hard coal mining in 1969 and retail and wholesale trade in 1971. Employer's contributions to tax-deductible saving schemes (*Vermögenswirksame Leistungen*) were introduced for construction workers in 1965 (and followed by numerous other branches in the 70s), and the 40 hour week was achieved for printing in 1965, metal industry and wood processing in 1967, construction in 1969, chemical industry, paper and textiles industry in 1970, retail in 1971, insurances in 1973, public services in 1974 and, finally, agriculture in 1983 (Tarifarchiv der Hans-Böckler-Stiftung, Die wichtigsten Tarifbewegungen und -abschlüsse, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-68F72AED/hbs/hs.xsl/559_16564.html, last accessed September 30th, 2005).

⁹² Tarifarchiv der Hans-Böckler-Stiftung, Stationen der Tarifpolitik – 60er Jahre: Zwischen “Konzertierter Aktion” und spontanen Streiks, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-1E433A65/hbs/hs.xsl/559_16600.html, last accessed September 30th, 2005.

⁹³ Tarifarchiv der Hans-Böckler-Stiftung, Stationen der Tarifpolitik – 60er Jahre: Zwischen “Konzertierter Aktion” und spontanen Streiks, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-1E433A65/hbs/hs.xsl/559_16600.html, last accessed May 1st, 2005.

The IG Metall, however, managed to conclude an agreement providing for wage rises after a strike in the metal industry in Baden-Württemberg, involving 300,000 workers – the greatest strike up to that point in the history of the *Bundesrepublik*. Employers previously had declared that they wanted

In 1963 the BAG decided that an employer needed to have the intent to offer reinstatement to workers for a (defensive) lockout to be lawful⁹⁴. In two other decisions it confirmed the illegality of wildcat strikes. The first held that illegally striking workers were liable for damages as joint debtors, while the second extended the liability to unions offering support to the strikers⁹⁵. The dividing line between a union officially supporting and thus taking over and legalising the strike and a union unofficially supporting the strike (by paying strike money) and thus being liable for damages is very thin, leaving unions in a grey area⁹⁶. They were thus detained from offering support to workers when they could not or did not want to officially take over the strike (e.g. due to the *Friedenspflicht*). Such decisions and the ensuing politics are able to alienate members from their unions.

The recession of 1966/67 marked a break in union policies. GNP fell by 0.3%, unemployment rose from 0.7 to 2.1%, and arguments for state intervention in the

to enforce a pay pause.

(Hans-Böckler-Stiftung, Tarifarchiv, cit. opp.)

⁹⁴ BAG December 6th, 1963, 1 AZR 223/63.

⁹⁵ BAG December 20th, 1963, 1 AZR 428/62 and 1 AZR 429/62.

⁹⁶ *see*: Theo Mayer-Maly, remarks to BAG 1 AZR 429/62, in: AP Nr. 33 zu Artikel 9 GG Arbeitskampf.

Mayer-Maly pointed to the contradiction between regarding a strike as illegal because it is not supported by a union while simultaneously holding the union liable for supporting the strikers. He assumes this might be due to the BAG demanding a clear announcement of the union's support; but, on the other hand, under German law only strikes supported by a union can be lawful. Therefore, any support by a union should be regarded as sufficient support. In the present case, however, even accepting the union's support as sufficient probably wouldn't have rendered the strike legal since it was not held for ends that may be regulated by collective agreement (Mayer-Maly, cit. opp.).

economy began to be generally accepted⁹⁷. The politics of *konzertierte Aktion*⁹⁸ were implemented and laid down in the 1967 *Stabilitätsgesetz*⁹⁹. Obviously, employers hoped that this would bring about a restriction in union wage claims¹⁰⁰, but unions rather perceived it as an instrument to become integrated into governmental wage policy – something British unions were keen to avoid. While rejecting the official wage guidelines, unions collective demands initially kept within their limits¹⁰¹; however, this

⁹⁷ Tarifarchiv der Hans-Böckler-Stiftung, Stationen der Tarifpolitik – 60er Jahre: Zwischen “Konzertierter Aktion” und spontanen Streiks, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-1E433A65/hbs/hs.xsl/559_16600.html, last accessed September 30th, 2005.

⁹⁸ Concerted action. A process of regular exchange of information and discussions between government, federal bank, council of economical advisors, employers’ associations and unions. (Tarifarchiv der Hans- Böckler-Stiftung, Stationen der Tarifpolitik – 60er Jahre: Zwischen “Konzertierter Aktion” und spontanen Streiks, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-1E433A65/hbs/hs.xsl/559_16600.html, last accessed May 1st, 2006)

⁹⁹ http://www.biologie.de/biowiki/Konzertierte_Aktion, last accessed September 21st, 2005.

Stabilitätsgesetz can be translated as Stability law – law to promote stability and growth of the economy. The aim was for all parties participating in the economic process to coordinate their actions in order to overcome the economic crisis. The idea was for representatives of the federal ministries of economics, of finance and labour, of the federal bank and the *Bundeskartellamt*, of the council of experts (*Sachverständigenrat*) as well as representatives of the business associations and the unions to meet several times per year to discuss pending economic problems, wage contracts and industrial planning, thus creating economic stability. The reciprocal information on each others expectations and interest was desired, but the meetings were not intended to reach binding arrangements that would limit the responsibility/decision-making powers of the government and free collective bargaining (*Tarifautonomie*). The first talks in 1967 included employers' association, unions, representatives of agriculture and representatives of the federal state, the individual states and the municipalities (*Bund, Länder und Gemeinden*).

Although it continued to exist until the unions withdrew in 1977, it was ineffective before that. Michael Schneider, *Kleine Geschichte der Gewerkschaften – Ihre Entwicklung in Deutschland von den Anfängen bis heute*, Bonn 1989, p. 319ff.; Dennis L. Bark, David R Gress, *A History of West Germany – Part 2, Democracy and its Discontents 1963 – 1991*, 2nd Edition, Oxford and Cambridge, Mass 1993, p. 84.

¹⁰⁰ Bundeszentrale für politische Bildung, Informationen zur politischen Bildung Heft 258, <http://www.bpb.de/publikationen/08595360513445560736840565438389.html>, last accessed September 20st, 2005)

¹⁰¹ Tarifarchiv der Hans-Böckler-Stiftung, Stationen der Tarifpolitik – 60er Jahre: Zwischen “Konzertierter Aktion” und spontanen Streiks, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-1E433A65/hbs/hs.xsl/559_16600.html, last accessed September 30th, 2005.

ended when the economy improved in the late 1960s¹⁰².

The economic upturn commenced in 1967 and soon turned into a boom. While wages stayed way behind business profits, IG Metall argued against high wage demands, and felt, despite the mounting dissatisfaction, still bound to an agreement concluded in 1966 that provided no rises in real wages. These factors gave rise to a number of unofficial strikes in September 1969¹⁰³.

Initially, these were not supported by the unions, the striking workforce elected their own spokesmen and chief negotiators (mostly members of the works council or *gewerkschaftliche Vertrauensleute*¹⁰⁴). However, the concerned unions (mainly IG Metall and IG Bergbau) managed relatively quickly to start negotiations and thus put themselves at the head of the movement. While both unions wished to end the strikes as soon as possible, the IG Bergbau tried to portray them as a result of communist and student agitators, IG Metall firmly resisted such (conspiracy) theories¹⁰⁵.

3D0AB75D-1E433A65/hbs/hs.xsl/559_16600.html, last accessed September 30th, 2005.

¹⁰² Bundeszentrale für politische Bildung, Informationen zur politischen Bildung Heft 258, <http://www.bpb.de/publikationen/08595360513445560736840565438389.html>, last accessed September 20st, 2005)

¹⁰³ Bundeszentrale für politische Bildung, Informationen zur politischen Bildung Heft 258, <http://www.bpb.de/publikationen/08595360513445560736840565438389.html>, last accessed September 20th, 2005; Horst Gobrecht, Improvisiert, zaghaft, perspektivlos und hilflos?, in: Marxistische Blätter 5/04, p. 87ff. <http://marxblaetter.placerouge.org/2004/04-5-87.html>, last accessed September 20th, 2005.

¹⁰⁴ Literally ‘union trust people’. They provide a link between the union and its members at the shop floor, but, unlike the British shop steward, they enjoy neither bargaining nor participation rights.

¹⁰⁵ Bundeszentrale für politische Bildung, Informationen zur politischen Bildung Heft 258, <http://www.bpb.de/publikationen/08595360513445560736840565438389.html>, last accessed 20st September 2005.

In the members' magazine of IG Bergbau from September 16th, 1969 the strikes were called “illegal” and “doomed to fail”. As to the permissibility of those strikes, the right to strike can be taken from Art 9, Abs 3 of the German constitution, the *Grundgesetz* (GG). However, a great deal of the actual rules governing strikes have been made by judges. One of those rules is that an industrial dispute is

The strikes had started as a result of members feeling not sufficiently represented by their unions (and a lot of rage and disappointment at the conduct of union representatives during and after the strikes was expressed), but unions incurred little loss of trust. This was mainly because works councillors and *Vertrauensleute* played an important role in organising the strikes and enjoyed the special trust of the workers. Most of the councillors were union-members, thus depicting a positive image of unions. Consequently, unions saw no great need to think about their policies or end their often criticised cooperation in the *konzertierte Aktion*¹⁰⁶.

However, some unions tried to learn from the experience and strived for a decentralization of their bargaining policy. Eager not to be outdone by workplace militants again, they tried for record wage claims after 1969. IG Metall achieved a more than 10% rise after token strikes in 1970 and the 1971 bargaining round saw higher demands and more stoppages, including the first strike in the chemical industry for 50 years¹⁰⁷. The unions' successes paid off in terms of memberships: the declining rate of

only permissible if it is conducted by a union, an employers' association or a single employer – that is, by parties that can be parties to a collective agreement (see § 2 Abs. 1 TVG (*Tarifvertragsgesetz* – *Law on collective agreements*). If a dispute is not carried by one of those parties, it is, as a wildcat action, not protected by Art. 9 Abs. 3 GG and illegal; however, if a union later on decides to take over such a strike, it will be legalised

(Bundeszentrale für politische Bildung, cit. Opp.; Günter Schaub (Ed.), *Arbeitsrechts-Handbuch – systematische Darstellung und Nachschlagewerk für die Praxis*, 11st Edition, München 2005, p. 1869, § 193, Rn. 13; BAG, December 20th, 1963, 1 AZR 429/62; BAG, October 21th, 1969, 1 AZR 93/68.

¹⁰⁶ <http://www.bpb.de/publikationen/08595360513445560736840565438389.html>, last accessed 20st September 2005; Peter Birke, 60 Pfennig nicht genug. Muss eine Mark. Wilde Streiks und Gewerkschaften in der Bundesrepublik, 1967 – 1973; Manuskript des Vortrages zur Konferenz “1968 und die Arbeiter. Ein europäischer Vergleich.” DGB-Bildungszentrum Hattingen, 11. 2. 2005, p. 7, <http://www.labournet.de/diskussion/geschichte/birke.pdf>, last accessed April 28th 2006.

¹⁰⁷ Peter Birke, 60 Pfennig nicht genug. Muss eine Mark. Wilde Streiks und Gewerkschaften in der Bundesrepublik, 1967 – 1973; Manuskript des Vortrages zur Konferenz “1968 und die Arbeiter. Ein europäischer Vergleich.” DGB-Bildungszentrum Hattingen, 11. 2. 2005, p.7; Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p.125;

unionisation in the 1960s was stopped and even reversed, while the policy of high claims was brought to an end with the global economical crisis after 1973¹⁰⁸.

The strikes also resulted in a shift of attention away from pure wage bargaining towards more “qualitative” demands, eventually leading to the concept of *Humanisierung der Arbeit*¹⁰⁹. “A third response, partly related, was the demand for a greater shopfloor role in collective bargaining”; summarized under the heading *betriebsnahe Tarifpolitik*, this could partly be seen as a new emergence of the old goal of a German-style shop stewards system and works councils more under union authority¹¹⁰. A result was the conclusion of *Lohnrahmentarifvertrag II (LRTV II)*. This agreement contained regulations regarding “payment by results, shift-work and overtime”, but also arrangements to “determine track speed, minimum hourly rest periods and minimum task times on assembly-line and repetition work”¹¹¹. It also brought some decentralisation since the applications of some of its principles were left to company-

Tarifarchiv der Hans-Böckler-Stiftung, Die wichtigsten Tarifbewegungen und -abschlüsse, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-68F72AED/hbs/hs.xsl/559_16564.html, last accessed September 30th, 2005.

¹⁰⁸ Peter Birke, 60 Pfennig nicht genug. Muss eine Mark. Wilde Streiks und Gewerkschaften in der Bundesrepublik, 1967 – 1973; Manuskript des Vortrages zur Konferenz “1968 und die Arbeiter. Ein europäischer Vergleich.” DGB-Bildungszentrum Hattingen, 11. 2. 2005, p.7; Richard Hyman, Understanding European Trade Unionism – Between Market, Class & Society, London 2001, p.125.

¹⁰⁹ Humanisation of work. The concept contained various offensives to improve working conditions in order to facilitate self-development and self-realisation. The first phase between 1974 and 1989 included attempts to better work contents and work relations, and a reduction of cumbering or unhealthy labour situations.

(wikipedia, Humanisierung der Arbeitswelt, http://de.wikipedia.org/wiki/Humanisierung_der_Arbeitswelt, last accessed May 1st, 2006).

¹¹⁰ Richard Hyman, Understanding European Trade Unionism – Between Market, Class & Society, London 2001, p.126.

¹¹¹ Richard Hyman, Understanding European Trade Unionism – Between Market, Class & Society, London 2001, p.125f.

Generally, “collective agreements reached in an individual bargaining district are extended across Germany, in this case employers were bitterly opposed to the encroachment into managerial prerogatives and LRTV II remained an isolated achievement” (Hyman, opp.cit, p. 126).

level agreement. However, unions' backing of an increasing degree of shop floor autonomy and decentralization of bargaining was merely rhetoric, as union leaders certainly could do without "the emergence of a structure of workplace representatives with the rights to strike and the capacity to define their own collective bargaining priorities"¹¹². As will be shown in following chapters, one of the reasons for the functioning of the dual system is that the spheres of unions and works councils are separated; especially, works councils have no bargaining rights.

In 1968, the BAG¹¹³ confirmed the illegality of wildcat strikes and held that employers had the right to dismiss workers participating without notice. If an employer had asked an employee repeatedly and justified to return to work and the employee still objected, he was guilty of an insistent refusal to work justifying a dismissal without notice¹¹⁴. Solidarity among workers, it was held, didn't justify participation in illegal strikes and employers had the right to restore "law and order" in the shop by every lawful mean; in case of a wildcat strike that might be a dismissal without notice. The principle of equal treatment was not held applicable for dismissals because of illegal strikes so that the employer had the right to dismiss one striker but not another, due to the notion that, if

¹¹² Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p.126.

¹¹³ BAG 1 AZR 93/68.

Even though this decision was issued just after the September strikes, it didn't concern those but rather dealt with a strike that took place in 1967. This decision was subject to criticism since it appeared that the reason for the wildcat strike lay in illegal and oppressive behaviour on the side of the employer, so that giving him the right to dismiss a striking worker without notice seemed a bit hard (Bernd Rüthers, *Anmerkung zu BAG 1 AZR 93/69*, *in*: AP Nr 41 zu Artikel 9 GG Arbeitskampf).

¹¹⁴ BAG 1 AZR 93/68.

This is generally held to render the continuation of the employment unreasonable for employers and thus constitutes an important reason for termination of contract necessary for dismissal without notice (Bernd Rüthers, *Anmerkung zu BAG 1 AZR 93/68*, *in*: AP Nr 41 zu Artikel 9 GG Arbeitskampf).

an employer presented with an unofficial strike had only the right to dismiss none or all of his workers, he would be forced to either concede to the demands of the strikers or lose his entire workforce and so suffer an economic loss¹¹⁵.

Confirming its restrictive position towards strikes, the BAG kept up a rather legalistic distinction between industrial action with or without union support. Only the former was justified and would not constitute a breach of contract, whereas the second would. Considering the number of obstacles the BAG had put before an 'official' strike, the constitutional right to strike by now was seriously constricted. The fact that not even the concept of "solidarity" endured before the court was able to impede any spontaneous actions of workers. British unions, on the other hand, enjoy no right to strike but are merely covered by immunities against actions in court and *Rookes v Barnard* has shown that this protection might be less broad than expected (and depends on the judiciary); thus both systems are able to restrict unions' room for manoeuvre.

1970 - 1979

United Kingdom

After taking office in 1970, the Conservatives put an end to the Prices and Income Board and passed the Industrial Relations Act 1971. For the first time now every written collective agreement was presumed to be legally binding, unless otherwise stated in the agreement itself. Registration was required to enjoy the protections and benefits, e.g. legal assistance in obtaining recognition; however, registered unions would be subject to strict requirements and the inspection of the Registrar¹¹⁶.

¹¹⁵ BAG, October 21st, 1969, 1 AZR 93/68.

¹¹⁶ This was quite revolutionary given that up till then it was impossible to make legally enforceable agreements. Even though most collective agreements of that time bore the stamp "TINALEA" (this

The TUC ordered its unions to not register alternatively to de-register. Most unions followed, the 32 who didn't de-register were expelled from the TUC. Generally, the Act was considered a fiasco¹¹⁷ and it is estimated that some 3,300,000 working days were lost due to protests against it¹¹⁸.

is not a legally enforceable agreement) courts still had to deal with the question of enforceability. In 1973 the National Industrial Relations Court clarified that the legal enforceability did not apply to agreements conducted before the coming into force of the IRA 1971 (*Stuart and others v Ministry of Defence and Electrical, Electronic and Telecommunications Union/Plumbing Trades Union* [1974] IRLR 143). In a decision by the Court of Appeal from 1973 the question whether the reduction of an oral understanding to writing constitutes a “written agreement” and therefore a legally binding agreement was left open (*The Mitsubishi Banks v National Union of Bank Employees* [1974] ICR 200).

The Act contained other measures concerning collective agreements and collective bargaining, for example legal provisions regarding recognition matters or machinery for and registration of procedure agreements. The Act furthermore provided for positive and negative freedom of coalition thus rendering the pre-entry closed shop illegal. In fact, the IRA 1971 did introduce statutory machinery for recognition for the first time and by their mere existence (Kidner described them as “somewhat legalistic and inflexible”) an extension of recognition especially among smaller employers was achieved. The National Industrial Relations Court was introduced as a division of the High Court, among its powers was the right to order a 60-day cooling off period or a ballot before a strike; it could also take action if written collective agreements were broken. There were to be no more legal immunities for unions in sympathy strikes and, importantly, it established the tort of “unfair industrial practice”, meaning those undertaking or being responsible for industrial action might be liable in damages and be the subject of an injunction unless the authorised by an official (there was a limit to damages for registered unions, according to their size, the limit for the biggest union was £ 100,000. No such limit was given for unregistered unions). This was derived from the Donovan Commission's analysis that officials needed to get a grip on shop stewards and rendered unofficial strikes illegal. These provisions were passed without consultation of the TUC, as has been good practice since 1945. In addition, the new Government made it harder for strikers' families to receive state support.

The Act also contained provisions on unfair dismissal of striking workers, stating in s 26 that a employee, who was dismissed because of his taking part in a strike or in “any irregular industrial action short of a strike” can only claim unfair dismissal if it can be shown that other employees taking part in that action were not dismissed or that other employees who were dismissed because if the industrial action were offered re-installment. (s 33 (4) provided the definition for irregular action short of a strike: “In this Act ‘irregular industrial action short of a strike’ means any concerted

National strikes reappeared and working days lost hit levels unknown since the 1920s, rendering policies of wage restraints unsuccessful. Wage rises up to 15 % were given¹¹⁹. The Counter Inflation (Temporary Provisions Act) 1972 was launched and imposed a statutory pay and price freeze for 90 days¹²⁰.

In January 1972, the NUM had called the first national miners strike since 1926, with Arthur Scargill developing his system of “flying pickets” picketing power stations, steelworks, ports and coal depots to stop their depots from being refilled. In February, state of emergency was declared but in the end the Government had to give in. The miners gained a 20% pay rise but in September 1973, after rejecting an offer of another 13% pay rise, the NUM imposed an overtime ban. The prime minister announced a three-day working week for the beginning of 1974, followed by power cuts. People were told “to brush their teeth in the dark”. When the miners balloted for an “all-out strike” the Government “called a general election on the issue of ‘who governs Britain’” - and lost. Before the election the Pay Board had given out the information that their

course of conduct (other than a strike) which, in contemplation or furtherance of a trade dispute, -(a) is carried on by a group of workers with the intention of preventing, reducing or otherwise interfering with the production of goods or the provision of services, and (b) in the case of some or all of them, is carried on in breach of their contracts of employment or (where they are not employees) in breach of their terms and conditions of service”).

(W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 222f; Philip Kolvin, *Collective Bargaining – Don't Cry for me Tina Lea*, *in: Current Law Week*, 2000 8(8); Brian Doyle, *Legal Regulation of Collective Bargaining*, *in: Roy Lewis (Ed.), Labour Law in Britain*, Oxford 1986, p. 112; H. A. Clegg, *The Changing System of Industrial Relations in Great Britain*, Oxford 1979, p. 320; Richard Kidner, *Trade Union Law*, London 1979, p. 296.)

¹¹⁷ Few complaints were made to the Industrial Court; the “cooling-off-period” was only used once, in spring 1972 in connection with a railway dispute. When a ballot was imposed as well, the workers voted with a great majority for strike (W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 223).

¹¹⁸ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 224.

¹¹⁹ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 225ff.

¹²⁰ *Chronicle September 1972 – December 1972, Government Policy and Activities*, *in: British Journal for Industrial Relations*, Vol.11, p. 149.

calculation of miner's wages “revealed that they were in fact substantially less well paid than workers in manufacturing industry”¹²¹.

The new Labour Government passed the Trade Unions and Labour Relations Act 1974, repealing the IRA 1971¹²².

The Employment Protection Act 1975 extended individual workers' rights and included, inter alia, rights to guaranteed payments and improved protection from dismissal¹²³. Unions were granted some immunities against legal action for breach of contract and the closed shop was protected¹²⁴. It gave trade unions a right to obtain information from the employer for bargaining purposes and with included a provision for the extension of collectively agreed terms¹²⁵. Employers were obliged to consult with trade unions before

¹²¹ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 225ff.

¹²² H. A. Clegg, *The Changing System of Industrial Relations in Great Britain*, Oxford 1979, p.383. The 1971 Act had abolished most of the legislation on trade unions and trade disputes since 1871 and a complete repeal would have meant a return to the situation before 1871; apart from that, government as well as unions wished to maintain some of the provision, e.g. on unfair dismissal. (Clegg, *opp. Cit.* p. 383)

The provisions of unfair dismissal because of taking part industrial action were for the most part taken on, however, an important change was that industrial action didn't require breach of contract anymore and other industrial action was not qualified as being irregular and short of strike anymore. It was confirmed in *Power Packing v Faust and others* [1983] Court of Appeal, QB 471, that “once an industrial tribunal decided that an employee was, at the time of his dismissal, taking part in industrial action, whether in breach of contract or not,..., the tribunal must, ..., refuse to entertain the employee's complaint of unfair dismissal, unless he had been subjected to discriminatory treatment in regard to the dismissal or re-engagement within the meaning of s 62 (2) of the Act”.

¹²³ Brian Doyle, *Legal Regulation of Collective bargaining*, in: Roy Lewis (Ed.), *Labour Law in Britain*, Oxford 1986, p. 112f.

For example, it rendered dismissal or discrimination because of trade union membership unfair (Doyle, *cit. opp.*, p. 112f.)

¹²⁴ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 230f.

¹²⁵ Brian Doyle, *Legal Regulation of Collective bargaining*, in: Roy Lewis (Ed.), *Labour Law in Britain*, Oxford 1986, p. 113.

Schedule 11, operating from January 1st, 1977, allowed independent trade unions or an employers' association to make a claim to the ACAS (which then will be transferred to the CAC (Central

redundancies; the Act therefore meant an improvement of unions' position both within and outside of the plant¹²⁶. The Advisory, Conciliation and Arbitration Service (ACAS) was established as an independent body "charged with the general duty of promoting the improvement of industrial relations, and in particular of encouraging the extension of collective bargaining"¹²⁷.

Labour also abandoned statutory incomes policies and instead relied on the 'Social Contract': unions agreed to keep demands for wage rises in line with the increase in the retail price index; in turn the Government would commit "to social policies, including improved employee protection"¹²⁸.

In 1976, the Trade Unions Amendment Act extended the protection of the closed shop by giving protection against dismissal only to those who objected to unionisation on religious grounds¹²⁹.

Union membership had reached record levels with more than 60% density among men

Arbitration Committee) if it cannot be otherwise settled) to invoke either terms and conditions set by industry or national agreement or observed generally for comparable employees in the same trade or industry, thus basically extending the principles of the 1946 Fair Wage Resolution to private employers. The provisions were widely used, with 1,900 claims being made to ACAS in the first two years of which 685 achieved an award. This high number has been linked to the continuation of incomes policy since awards made by the CAC were exempted from restrictions under the *Attack on Inflation*.

(Brian Bercusson, The New Fair Wages Policy: Schedule 11 to the Employment Protection Act, *in*: The Industrial Law Journal, Vol. 5, No. 3, p. 129ff. (p. 129); Michael Jones, CAC and Schedule 11: The Experience of Two Years, *in*: The Industrial Law Journal, Vol. 9, No. 1, p. 28ff. (p. 28f., 33, 35, 42))

¹²⁶ Brian Doyle, Legal Regulation of Collective Bargaining, *in*: Roy Lewis (Ed.), Labour Law in Britain, Oxford 1986, p. 113.

These consultation obligations were an implementation of the Directive for Collective Redundancies, *see* Chapter IV.

¹²⁷ GS Morris, TJ Archer, Trade Unions, Employers and the Law, 2nd Edition, London 1993, p. 30; Richard Kidner, Trade Union Law, London 1979, p. 296.

¹²⁸ W. Hamish Fraser, A History of British Trade Unionism 1700 – 1998, London 1999, p. 230.

¹²⁹ W. Hamish Fraser, A History of British Trade Unionism 1700 – 1998, London 1999, p. 230f.

and more than 50% overall in 1974. Unions used the moment and, by “catch-up increases and demand for earlier pay rises to be incorporated into basic pay”, secured pay rises of 35% and more. However, after yet another sterling crisis in 1975 restraining measures on wages, prices and dividends were, with TUC agreement, imposed once again. In 1977, with inflation rising and real wages falling, miners demanded a pay rise of nearly 50%¹³⁰ and the TUC, in violation of the Social Contract, voted for “the abolition of all wage restraint”. The Government tried to impose a 5% maximum on wage increases in the autumn of 1978 and, without TUC support of the restraint, was soon facing the “winter of discontent”¹³¹. Unions declared they would not comply with any wage restraint and called for a return to free collective bargaining with demands for pay rises as high as 40%. When those were unmet, industrial action followed throughout the country. As Moss Evans, then Secretary of the TGWU, put it: “It is not my responsibility to manage the economy. We are concerned with getting the rate for the job.”¹³² However, the decision to reject “the concept of incorporation into the process of government in favour of the traditional free-for-all of the voluntarism system of wage negotiations” led to the defeat of the Labour Government at the 1979 elections¹³³.

Germany

The 70s were characterised by the after-effects of the 1968 revolt, resulting in greater shop floor militancy and wildcat strikes. Also, the ensuing global economical crisis soon changed the focus of collective bargaining away from pure wage bargaining towards more protection against rationalisation.

¹³⁰ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 231f.

¹³¹ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 233.

¹³² W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 233f.

¹³³ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 235.

In 1971, the BAG again had to deal with the question of whether a lock-out cancelled or just suspended the contracts of employment and amended the rules set up in 1955¹³⁴. Employers' right to lockout was upheld in principle under the aspect of *Kampfparität*¹³⁵, but the right to a terminating lockout was restricted.

Against the background of 'pinpoint strikes'¹³⁶, suspending lockouts of non-striking workers would serve a purpose. It was also held that those could be meaningfully used against striking workers. Employers could use them as a first warning sign and switch to a terminating lockout later, they could also hold up the lockout after the fighting union had declared the end of the strike. However, under the principle of commensurability employers were only allowed to do so if they were still using the lockout as a *Kampfmittel*¹³⁷ to pursue aims of the industrial dispute.

A terminating lockout was held to be only permissible under certain circumstances. While an employer usually would not have a *schutzwürdiges Interesse*¹³⁸ for a terminating lockout, this may change during the course of the strike and due to special circumstances. Since industrial action may only be taken with the aim of concluding a collective agreement and industrial peace shall be restored as quick as possible, employers might need to answer a longer lasting strike with a terminating lockout in order to facilitate an agreement. The employer might also try to rationalise jobs in a longer lasting conflict, this too would justify a terminating lockout. As an answer to illegal strikes, terminating lockouts are subject to fewer constraints.

¹³⁴ BAG Großer Senat, Beschluß vom 21. April 1971, GS 1/68

¹³⁵ Literally 'battle parity'. See footnote 61 for a more extensive explanation.

¹³⁶ Strikes involving only a limited number of workers but rendering a bigger number useless.

¹³⁷ Literally 'means of battle' – means that are (legally) used in industrial action.

¹³⁸ Literally 'interest worthy of protection'. A *schutzwürdiges Interesse* must be present for a terminating lockout to be justified.

It was also held that generally employees, as long as their jobs are still existent, are to be reinstated after a terminating lockout. This departure from the 1955 decision was founded with the argument that the earlier decision didn't take the fact into account that industrial action is a means to an end. After the goal is met, industrial peace has to be restored and therefore, as far as possible, the locked-out workers have to be reinstated. Reinstatement therefore lay not in the *free*, but in the *fair* discretion of the employer¹³⁹. This does not mean that all employees are to be reinstated; in fact, if an employee's job has been given to someone else or is no longer existent due to rationalisation, reinstatement is neither possible nor necessary. However, if the job is still available, and the strike had been legitimate, the mere fact that the employee had taken part in it does not justify a refusal of reinstatement. Was the strike illegitimate, employees who knew about the illegitimacy and still played a prominent role in the dispute need not to be reinstated; however, also after an illegitimate strike the employer has to consider reinstatement with fair discretion.

The *Große Senat* thus widely restricted the right to lockouts. Also, re-instatement after the dispute now was fully reviewable by the courts, giving workers rights against discriminatory and disciplinary measures by the employers.

In 1973, wildcat strikes occurred again¹⁴⁰ and about 275.000 employees in 335 plants

¹³⁹ The difference between "fair" and "free" discretion is that fair discretion is fully verifiable by the courts, who check if the specific workplace is still existent and free and also if the final cancellation of just this contract was necessary; if just one of a number or comparable workplaces is not available anymore the court also have to check if the employer chose the workers to be terminated in a proper way.

¹⁴⁰ A collective agreement conducted in that year for the steel industry provided for a wage rise of 8.5%. Steelworkers, however, were not content with this margin and so the first strikes soon erupted, since a collective agreement had just been conducted these strikes took place during the peace obligation and were not supported by any union. It started off with 100 employees of Hüsbeck & Fürst in Velbert, soon to be followed by about 15.000 Hoesch employees in Dortmund.

joined the strikes between February and October. Most of the strikes were successful in gaining cost of living bonuses of 20 or 30 Mark per month, rises of up to one Mark more per hour or other benefits¹⁴¹.

Reactions of the unions were, as in 1969, “ambivalent and contradictory”. As Markovits pointed out, “the strikes provided both a learning experience and an opportunity to co-opt the militancy of the workforce”, but unions also tried to discipline the activists (especially those where communist influence was suspected) and some even were expelled¹⁴².

The Mannesmann plant in Duisburg-Huickingen was occupied for a week and in April about 10.000 workers of Volkswagen joined the strike. The best known incident, however, is probably the strike at Ford's Cologne plant at the end of August 1973. 17.000 workers went on strike with the central demand being a wage rise of 1 mark per hour. During the strike other demands, like higher manning on machines, 6 weeks paid holiday and lowering of average work rates, were added. However, management tried splitting the workforce between Germans and Turks (with help from IG Metall work council members, who negotiated concessions with management improving mainly the situation of the German workers without taking the demands of the Turkish workers into account). Eventually a fight between strikers and strike-breakers, accompanied by a massive police presence, broke out and finally the leaders of the strike were fired. (One factor that differed the 1973 strikes from the ones that took place in 1969 was the often a central focus of dissent was the situation of migrant workers; this is especially true of the Ford strike, which was mainly carried out and supported by Turkish workers. Many immigrants had the impression that the politics of works councils and trade unions were mainly benefiting the – usually more skilled and better paid – German workforce while neglecting the concerns and issues of the “guest workers”, usually employed in low wage groups, such as “work intensification in routine jobs, insecurity, and arbitrary and oppressive discipline”).

(Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p.125.; Ursel Beck, *Vor 30 Jahren – August 1973 – Höhepunkt wilder Streiks*, <http://www.labournet.de/diskussion/geschichte/august73.html>, last accessed September 21st, 2005).

¹⁴¹ Ursel Beck, *Vor 30 Jahren – August 1973 – Höhepunkt wilder Streiks*,

<http://www.labournet.de/diskussion/geschichte/august73.html>, last accessed September 21st, 2005.

¹⁴² Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p.125.

The global economic crisis, triggered by the oil price shock in 1973/74, didn't leave Germany unscathed¹⁴³. It put unions in a defensive position and thus collective agreements of this time concentrate more on protecting employees against job cuts and negative effects of new technologies rather than wage rises. In this context the idea of job-protection through reduction of working time gained importance. In 1977, IG Metall demanded the 35-hour week for the first time¹⁴⁴.

Different from British unionism, the DGB favoured state intervention to counter unemployment, even though it was aware of the fact that this form of *Konjunkturpolitik*¹⁴⁵ would increase public deficits. However, such spending, it was argued, should be seen as a loan. After all, the state would benefit from a higher employment rate not only in terms of taxes and social expenditures but also in less money spent on unemployment and welfare benefits¹⁴⁶.

1979 – 1984

¹⁴³ Andrei S. Markovits, Christopher S. Allen, Power and Dissent: The Trade Unions in the Federal Republic of Germany Re-Examined, *in*: Jack Hayward (Ed.), Trade Unions and Politics in Western Europe, London 1980, p. 75.

Capital and labour had different concepts for dealing with the situation. In the eyes of employers, wage restraints would lead to higher profits, more investment and thus, eventually, to more employment. Unions, on the other hand, advocated wage increases, which, since workers were providing the largest group of consumers, would lead to higher consumption, thus to higher profits and more investments and, eventually, to more jobs (Markovits and Allen, cit. opp., p. 77)

¹⁴⁴ Tarifarchiv der Hans-Böckler-Stiftung, Stationen der Tarifpolitik – 70er Jahre: Boom, Wirtschaftskrise, Massenarbeitslosigkeit, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-A1A41265/hbs/hs.xsl/559_16601.html, last accessed September 30th, 2005.

¹⁴⁵ Business cycle policy.

¹⁴⁶ Andrei S. Markovits, Christopher S. Allen, Power and Dissent: The Trade Unions in the Federal Republic of Germany Re-Examined, *in*: Jack Hayward (Ed.), Trade Unions and Politics in Western Europe, London 1980, p. 78.

United Kingdom

The election of Margaret Thatcher in 1979 heralded a new age in the relations between state and trade unions. While in the 1960s Kahn-Freund could write about British industrial relations that “there is perhaps no major country in the world in which the law has played a less significant role in the shaping of these relations”¹⁴⁷; at the end of the Thatcher regime those had come to be “one of the most tightly regulated systems in advanced democracies.”¹⁴⁸

Thatcher believed in the free market's ability to correct all economic wrongs and set off to reduce trade union power by cutting back on their legal protections and giving greater freedom to the Common Law; she fiercely believed that trade unions impeded the free market. The rights of employers to hire and fire at will were believed to be crucial for the free market and therefore for economic success. Unemployment benefits had to be cut down since in Conservative belief high benefits stopped dismissed workers from competing with employed workers by being willing to work for a lower salary, so that the market could not properly operate (and reduce wages)¹⁴⁹. For the Conservative Government of 1979 trade unions were the root of all economic evil:

“the real exploiters in our present society are not egoistic capitalists or entrepreneurs and in fact not separate individuals but organisations which derive their power from the moral support of collective action and group loyalty”;

or, as F.A. Hayek, who had an important intellectual influence of the government, put it:

¹⁴⁷ Otto Kahn-Freund, *Legal Framework*, in: Allan Flanders, H. A. Clegg, *The System of Industrial Relations in Great Britain – Its History, Law and Institutions*, Oxford 1967, p. 42ff. (p. 44).

¹⁴⁸ John McIlroy, *The Permanent Revolution? - Conservative Law and the Trade Unions*, Nottingham 1991, p. 5.

¹⁴⁹ John McIlroy, *The Permanent Revolution? - Conservative Law and the Trade Unions*, Nottingham 1991, p. 11f.

“These legalised powers of the unions have become the biggest obstacle to raising the living standards of the working class as a whole. They are the chief cause of the unnecessarily big difference between the best-and worst-paid workers. They are the prime source of unemployment. They are the main reason for the decline of the British economy in general”¹⁵⁰.

Since the First World War unions had become more and more integrated into the political system. Now, they were treated with a policy of exclusion and efforts were made to weaken their power (and workers' power in general), to strengthen the individual at the expense of the unions, and, of course, to undermine collective bargaining¹⁵¹. Conservatives aimed at the restoration of one-to-one negotiations, linked to their desire to obtain a greater flexibility of labour. Furthermore, they were not content with the weakening of collective bargaining that would automatically yield from the weakening of trade unions, but in addition abolished specific instruments aiding the process, such as the Fair Wages resolution or the Wage Councils. The apex was the elimination of the teachers' collective bargaining machinery in 1987. Needless to say, union de-recognition was on a rise and the government was determined “to resist EEC initiatives which might stimulate a strengthening or extension of collective bargaining”¹⁵².

The first Employment Act to be passed under the new Government in 1980 was not particularly revolutionary, though. Employment Secretary James Prior still stood in the conservative tradition of maintaining industrial peace. While secondary strike action

¹⁵⁰ John McIlroy, *The Permanent Revolution? - Conservative Law and the Trade Unions*, Nottingham 1991, p. 12f.

¹⁵¹ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 238.

¹⁵² John McIlroy, *The Permanent Revolution? - Conservative Law and the Trade Unions*, Nottingham 1991, p. 18f.

was rendered illegal (and corresponding immunities for officials removed) and picketing only allowed if carried out by workers of the affected workplace¹⁵³, it didn't abolish the closed shop. These could still be set up if 80 % of the workers covered by the agreement voted for it in a ballot; existing closed shops were left untouched. Unions themselves did not lose any of their immunities¹⁵⁴. However, the two Social Security

¹⁵³ Charles G. Hanson, *Taming the Trade Unions – A Guide to the Thatcher Government's Employment Reforms, 1980 - 1990*, London 1991, p. 24; W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 235; Brian Bercusson, *Picketing, Secondary Picketing and Secondary Action*, in: *The Industrial Law Journal*, Vol. 9, No. 4, p. 215ff. (p. 215). Secondary action remained lawful, however, if its principal purpose is to directly prevent or disrupt the supply during the dispute of goods and services between an employer party to the dispute and the employer subject to the secondary action. And although picketing at one's own place of work was not rendered illegal it may constitute secondary action and might thus be unlawful). The adoption of a subjective interpretation of the words “in contemplation or furtherance of a trade disputes” by the House of Lords in *Express Newspapers v McShane* [1980] 2 WR 89 (H.L.), where it was held that statutory immunity was to be granted if it could be reasonably believed that the secondary action could further the dispute, was thus rendered untenable. (Bercusson, cit op., p. 216f, 221)

¹⁵⁴ Charles G. Hanson, *Taming the Trade Unions – A Guide to the Thatcher Government's Employment Reforms, 1980 - 1990*, London 1991, p. 24; W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 235; Patrick Elias, *Closing in on the Closed Shop*, in: *The Industrial Law Journal*, Vol. 9, No. 4, p. 201ff. (p. 201f, 204). However, the Closed Shop began to be under attack since the statutory rights of non-members in a closed shop were extended. The Code of Practice on Closed Shop Agreements and Arrangements, which was issued by the Secretary of State for Employment with powers given by the Employment Act, made the introduction or the maintaining of a closed shop much more difficult, however. It stated pretty clear that the government wished to put an end to the closed shop; about pre-entry closed shops it was said that “no new agreements of this type should be contemplated and where they currently exist the need for their continuation should be carefully reviewed”. The point of closed shops, providing solidarity and a united workforce as well as reinforcing union discipline, was diminished by the fact that union membership agreements (!) should provide that a closed-shop worker, when refusing to participate in industrial action and therefore being removed from his union, cannot be dismissed. Existing closed shops should be reviewed every few years. Similar was true for the Code of Practice on Picketing, which equally worsened the legal situation of pickets and picketing in general, by for example restricting the number of pickets to six at any entrance to a workplace. (John McIlroy, *The Permanent Revolution? - Conservative Law and the Trade Unions*, Nottingham

Acts of 1980 drastically cut down on benefits for anyone who lost their jobs as a consequence of a trade dispute¹⁵⁵. In agreement with the Government's hostile position towards unions, the 1975 legislation regarding trade union recognition was abolished and ACAS given the authority to deal with recognition claims. ACAS now had less recognition claims referred to and the proportion of successful claims declined¹⁵⁶.

Unemployment was rising and the Conservatives had made it clear from the beginning that their priority was to reduce and control inflation rather than fighting unemployment¹⁵⁷ and, as former TUC General Secretary Len Murray admitted later on, unions were unprepared for Thatcher's attack:

“We didn't believe a lot of what she was saying... we just didn't believe it. Our major error was that we didn't believe she was committed to a very radical reorganisation in the industrial relations field”.

1991, p. 30, 43; Patrick Elias, Closing in on the Closed Shop, *in*: The Industrial Law Journal, Vol. 9, No. 4, p. 201ff (p.201, 204.))

¹⁵⁵ Martin Partington, Unemployment, Industrial Conflict and Social Security, *in*: The Industrial Relations Journal, Vol. 9, No. 4, p. 243ff. (p. 248).

Unemployment benefit was never available to anyone participating or directly interested in a dispute, but dependants could claim supplementary benefits. The 1980 Acts stated that all payments received during the dispute were taken into account, whereas there had been a £4 before. There would also be no payments if the weekly rate would be £12 or less, rates above £12 would be diminished by £12 and no urgent needs payments were to be made. No extra allowances for heating or special allowances would be made if a member of the family was engaged in a industrial dispute (Partington, *cit. opp.*, p. 249f.).

¹⁵⁶ John McIlroy, The Permanent Revolution? - Conservative Law and the Trade Unions, Nottingham 1991, p. 26.

However, the procedure had been so complex that employers had been able to find a series of legal loopholes to challenge ACAS findings. Still, statutory recognition was not to be reintroduced until 1999.

(Richard Painter, Ann Holmes, Cases & Materials on Employment Law, 4th Edition, Oxford 2002, p. 698; GS Morris, TJ Archer, Trade Unions, Employers and the Law, London 1993, p. 5; *see Grunwick v ACAS* [1975], AC 655).

¹⁵⁷ W. Hamish Fraser, A History of British Trade Unionism 1700 – 1998, London 1999, p. 236.

Therefore, unions didn't develop a strategy of opposition; it has to be admitted, however, that "the bitty, piecemeal nature of the legislation, despite its wide sweep when examined as a whole, made coordinated opposition difficult"¹⁵⁸.

The 1982 Employment Act, passed under Norman Tebbit as Employment Secretary, tightened legislation on the closed shop, with pre-entry ones made illegal and post-entry ones requiring a ballot with 85% approval. Additionally, unions were obliged to compensate any worker who did "not accept a closed shop". Employers were given greater freedom to dismiss striking workers and a right "to sue for damages and to get court injunctions to halt industrial action"¹⁵⁹.

The definition of a trade dispute was narrowed so that from now on, only disputes between workers and *their* employer would fit the definition and therefore provide immunity to union officials acting in "contemplation or furtherance of a trade

¹⁵⁸ John Mellroy, *The Permanent Revolution? - Conservative Law and the Trade Unions*, Nottingham 1991, p. 49f.; Len Murray was interviewed in "The Thatcher Decade" *Radio 4*, April 11, 1989.

¹⁵⁹ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 237; GS Morris, TJ Archer, *Trade Unions, Employers and the Law*, 2nd Edition, London 1993 p. 5; K.D. Ewing, *Industrial Action: Another Step in the "Right" Direction*, in: *The Industrial Law Journal* Vol. 11, No. 4, p. 209ff. (p. 209).

The Act was also intended to reverse the decision (which was considered aberrant and was inconsistent with *Rookes v Barnard*) of the Court of Session in *Plessey PLC v Wilson* [1982] IRLR 198, where it was held that "unlawful acts may attract immunity where the only consequences which give rise to a claim in reparation are interferences with the trade or business of the complainer." (K. D. Ewing, cit. opp., p. 209).

These rights were soon applied when the National Graphical Association (NGA) tried to "enforce a closed shop and existing agreed employment conditions in provincial newspapers at a Warrington newspaper printing works by the use of mass picketing". It ended up with fines of £50.000, enhanced to £100.000 after refusing to obey to court orders. Its attempt to call a nationwide sympathy strike was declared illegal and it became clear that the General Council of the TUC would not back up further action. It was fined another £ 525.000 and the NGA finally had to back down just to survive (W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 237f.)

dispute”¹⁶⁰. Disputes between different groups of workers were no longer considered to be trade disputes and political strikes were also much harder to fit under the new definition. It was rendered unlawful to resort to industrial action to support or to demonstrate solidarity with fighting workers abroad, unless it was likely that British workers would be affected by the foreign dispute. It is clear that industrial action now was much more likely to be unlawful than it used to be; besides, the right to claim unfair dismissal for being selectively dismissed while taking part in industrial action was reduced. The immunities of the 1906 Trade Dispute Act were removed and unions would be liable for acts presenting economic torts or for conspiracy to commit a tort authorised or endorsed by a responsible person. Aside from that, they would also be liable for acts of servants or agents undertaken within the scope of their liability or endorsed by the union; abolishing the wider immunity for unions compared to that of union officials or individuals. Damages to be put on unions were limited, though,

¹⁶⁰ John McIlroy, *The Permanent Revolution? - Conservative Law and the Trade Unions*, Nottingham 1991, p. 58f; GS Morris, TJ Archer, *Trade Unions, Employers and the Law*, 2nd Edition, London 1993, p. 5; Charles G. Hanson, *Taming the Trade Unions – A Guide to the Thatcher Government's Employment Reforms, 1980 - 1990*, London 1991, p. 24f.; K.D. Ewing, *Industrial Action: Another Step in the “Right” Direction*, in: *The Industrial Law Journal* Vol. 11, No. 4, p. 209ff.(p. 216).

In 1979 the House of Lords had held that a dispute carried out by the International Transport Federation against ship owners who were not meeting the minimum conditions laid down by them without participation of the employees in question, would fit the definition “trade dispute” since it had a clear connection to terms and conditions of employment, thus recognizing the then underlying legislative policy of excluding trade disputes from judicial review. Lord Scarman put it: “All that [s. 29 (1)] requires is that the dispute be connected with one or more of the matters it mentions. If it be connected, it is a trade dispute and it is immaterial whether the dispute also relates to other matters or has an extraneous, e.g. political or personal motive. The connection is all that has to be shown”.(*NWL v Nelson, NWL v Woods*, [1979] 1 WLR 1294 (H.L.); reported in *The Industrial Law Journal*, Vol. 9, No. 1, p. 45ff. (p. 45).) Such action was now rendered unlawful.

In *Express Newspapers v McShane* [1980] 2 WLR 89 (H.L.) the House of Lords advocated a subjective interpretation of “in furtherance or contemplation” of a trade dispute. A trade dispute therefore was given when the act in question could reasonably be believed to foster the dispute. This point of view was also outlawed by the new legislation.

ranging from £10,000 for unions with less than 5,000 members to £250,000 for unions with more than 100,000 members¹⁶¹.

Government took another step towards individualisation of industrial relations with the abolishment of the Fair Wages Resolution in 1983, in force since 1946. The Resolution, also adopted by nationalised industries and local authorities, had stated that all government contractors and subcontractors should pay wages and observe terms and conditions not less favourable than those established by collective bargaining in that trade or industry¹⁶². The abolishment was in line with arguably the most bold strike against unions in the early days of the Thatcher Government; the banning of trade unions at the GCHQ at Cheltenham. Although the last union members were not

¹⁶¹ John McIlroy, *The Permanent Revolution? - Conservative Law and the Trade Unions*, Nottingham 1991, p. 60f; GS Morris, TJ Archer, *Trade Unions, Employers and the Law*, 2nd Edition, London 1993, p. 5; Charles G. Hanson, *Taming the Trade Unions – A Guide to the Thatcher Government's Employment Reforms, 1980-1990*, London 1991, p. 24f.; K:D: Ewing, *Industrial Action: Another Step in the "Right" Direction*, *in: The Industrial Law Journal*, Vol. 11, No. 4, p. 209ff. (p. 215); *Essex Papers in Politic and Government*, No 79: David Marsh, *Trade Unions under Mrs Thatcher: Loss without Limit?*, Essex 1991, p. 5.

s 15(3) provides that a responsible person would either be "(a) the principal executive committee of the union; (b) any other person who is empowered by the rules to authorise or endorse acts of the kinds in question; (c) the president or general secretary; (d) any other employed official; and (e) any committee of the union to whom an employed official regularly reports". Categories (d) and (e) would not incur liability when the act was repudiated by the union or the person acting was not allowed to authorize or endorse such acts. However, a union would also not be liable in tort when the action in question was authorized by a ballot of members or a conference of the union or if it was *ultra vires* the rules of the union (K.D. Ewing, *opp. cit.*, p. 219, 221).

¹⁶² John McIlroy, *The Permanent Revolution? - Conservative Law and the Trade Unions*, Nottingham 1991, p. 62f.

Even though employees enjoyed no direct rights under the Fair Wages Resolution, they had the right to make a complaint to the CAC that an employer failed to meet the described standards but a decision in favour of the employee did not become automatically part of the employment contract but only if the employer agreed to incorporate its implications into the contract (Brian Doyle, *Legal Regulation of Collective bargaining*, *in: Roy Lewis (Ed.), Labour Law in Britain*, Oxford 1986, p. 120f.).

dismissed until 1988, it was not before 1997, when Labour took office again, before the right to union membership was at least partly restored¹⁶³.

While the Trade Unions Act 1984 mainly contained provisions regarding union ballots, whether in “union elections, [...] prior to industrial action and [...] on the maintenance of unions’ political funds”, unions were also held legally responsible for official industrial action. Statutory immunity granted by s 13 of TULRA 1974 against liability in tort was now only to be given if a ballot was held with a majority vote in favour prior to the industrial action¹⁶⁴.

The miners' strike in 1984-85 demonstrated the weakening of unions due to Thatcher's policy. The NUM, traditionally one of the more militant unions, had to bow down to the law eventually¹⁶⁵. Since there had never been a ballot, as required under the Trade Unions Act 1984, the strike was technically illegal and therefore the “union could not refer to the stoppage as official, issue instructions to the membership to strike and to respect picket lines or initiate disciplinary action against strike breakers”¹⁶⁶.

¹⁶³ W. Hamish Fraser, *A History of British Trade Unionism 1700 – 1998*, London 1999, p. 239.

¹⁶⁴ John McIlroy, *The Permanent Revolution? - Conservative Law and the Trade Unions*, Nottingham 1991, p. 81; GS Morris, TJ Archer, *Trade Unions, Employers and the Law*, 2nd Edition, London 1993, p. 5; Charles G. Hanson, *Taming the Trade Unions – A Guide to the Thatcher Government's Employment Reforms, 1980 - 1990*, London 1991, p. 27; John Hutton, *Solving the Strike Problem: Part II of the Trade Union Act 1984*, in: *The Industrial Law Journal*, Vol. 13, No. 4, p. 212ff. (p. 212).

¹⁶⁵ John McIlroy, *The Permanent Revolution? - Conservative Law and the Trade Unions*, Nottingham 1991, p. 88.

Interestingly, it did not have to back down to the new Acts of the 1980s but rather to criminal law used by the police (McIlroy, cit. opp. p. 88).

¹⁶⁶ *Taylor v NUM (Derbyshire Area)* [1984] IRLR 440; John McIlroy, *The Permanent Revolution? - Conservative Law and the Trade Unions*, Nottingham 1991, p. 91; K. D. Ewing, *The Strike, the Courts and the Rule-Books*, in: *The Industrial Law Journal*, Vol. 14, No 3, p. 160ff. (p. 162), in a number of Areas the strike was also illegal due to breach of Area rules.

Additionally, the police treated the recommendations of the Picketing Code of Practice as a legal norm, restricting the number of “official” pickets to six. Massive police presence regularly outnumbered pickets, though police action against them varied from utter determination in enforcing the picket regulations of the Employment Act 1980 to co-operation with the official pickets¹⁶⁷. The law (not only Employment law but Common, Civil and Criminal law as well) was used on a much greater scale in this conflict than it was in former major disputes, confirming “the growing ‘legalisation’ of industrial conflict in Britain”¹⁶⁸. The priced “free market” and deregulation of the economy hence was accompanied by tight regulation of union activities.

¹⁶⁷ Peter Wallington, Policing the Minders' Strike, *in*: The Industrial Law Journal, Vol. 14, No. 3, p. 145ff. (p. 153); John McIlroy, The Permanent Revolution? - Conservative Law and the Trade Unions, Nottingham 1991, p. 88f.

¹⁶⁸ John McIlroy, The Permanent Revolution? - Conservative Law and the Trade Unions, Nottingham 1991, p. 93.

For example, in *Thomas v NUM (South Wales Area)* [1985] 2 All ER 1 the picketing in question didn't fall under the provision of s 16(1) of the Employment Act 1980 for lawful picketing and it was declared that mass picketing presented a common law nuisance and therefore a tort as well as being criminal under s7 of the 1875 Act. In *Taylor v NUM (Yorkshire Area)*, [1985] The Times 20 November 1985, union members applied for a decision that payment from union funds to support the strike were unlawful and a misapplication of the union's funds. The High Court held that “payments made by the defendant union in connection with the strike against the National Coal Board to pickets for picketing duty and for the relief of hardship of miners on strike were beyond the powers of the union since the strike was not authorised and was in breach of the union's rules. The payments were therefore an unlawful misapplication of the union's funds.” However, the officials were not required to restore the money to the union since it could not be out-ruled that a majority of the members would resolve that no action should be taken. In *Taylor v NUM (Derbyshire Area)* [1984] IRLR 440 the High Court ruled that the strike called by the NUM and the Derbyshire Area of the union was in breach of the rules of the NUM and the Derbyshire Union and thus invalid. It was also unlawful since there hadn't been a national ballot and the Derbyshire ballot had turned out against the strike. Therefore the union was not entitled to discipline the plaintiffs for disregarding instructions to strike or to not cross picket lines. The suspension of the membership of the plaintiffs for continuing to work was therefore void.

Germany

Policies of collective agreements in the early 80s were characterised by a sharp economic recession which peaked in 1982. Unemployment crossed the 2-million mark. Furthermore, 1982 brought a conservative government under Chancellor Helmut Kohl that was to last for 16 years, and which, even though German conservatism under Kohl was less hostile to trade unions than the Thatcher Government, still brought about an economic and financial policy that was mainly supply orientated and entailed a drastic reduction in social benefits and protection rights¹⁶⁹.

Probably the most important topic in tariff disputes during the 1980s was *Arbeitszeitverkürzung*¹⁷⁰. IG Metall had decided to campaign for the 35 hour week without loss of pay in the late 1970s. Many unions thought this unachievable and were not convinced that it was actually a way to save jobs, but IG Metall managed to persuade the DGB to adopt this goal¹⁷¹.

¹⁶⁹ Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p.127; Tarifarchiv der Hans-Böckler-Stiftung, Stationen der Tarifpolitik -80er Jahre: Arbeitszeitverkürzung und qualitative Tarifpolitik, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-A1A41265/hbs/hs.xsl/559_16602.html, last accessed September 30th, 2005.

¹⁷⁰ Reduction in working hours.

¹⁷¹ Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p.128f.

A taboo catalog by employers listed the 35-hour week, however the connection between working time and unemployment and the discussion on working time itself was a dominating topic at that time, for the Green Party supported in their programme for the elections to the *Deutscher Bundestag* in 1983 the aim of a 35-hour week with full pay for low and middle paid jobs and the Social Democrats advocated an “international employment pact” which should supply a lead-in to the 35-hour week as well as to a reduction of the life-working-time (*Lebensarbeitszeit*). The Liberals had a passage on “liberalization of working time” as well, but rather in terms of part-time jobs while the Christian democrats and the Christian Social Union rather preferred to lower the pension age and create more part-time jobs (Rolf A. Beyer, *Deutschland heute – Politik – Wirtschaft – Gesellschaft*, Leamington Spa 1986, p. 84f.; Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p.128f).

A first strike for the 35-hour week in the steel industry did achieve some benefits included on the employers' taboo list¹⁷² (increased holiday entitlement, for example) while failing to gain any reduction in the working week. The main disputes, a six-and-a-half week strike in the metal industry and a twelve week dispute in printing, the most expensive and bitterly fought in the history of German labour battles, occurred in 1984. When the former was ended by arbitration, the outcome was a complicated compromise. The average working week would be 38.5 hours, but the individual standard working week could be anywhere between 37 and 40 hours. The details were left for discussions between management and works councils on the shopfloor. However, a breakthrough through the "40-hour-barrier" was achieved and soon the general norm for working hours in collective agreements was 38.5, with IG Metall and IG Medien obtaining the 35 hour week by the mid 90s¹⁷³.

Unions celebrated the reduction of the working week and regarded the 1984 strikes as proof of their ability to act even in times of economic crisis (besides, the second step of reduction of working time in 1987 was achieved without any industrial action); but the price to pay, apart from greater flexibility, was a shift of power towards the works councils that were now able to undercut unions' official politics on the company level. A

¹⁷² A list by employers who got known to the public shortly before. It included certain topics employers thought were not negotiable.

¹⁷³ Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p.128f; Stephen J. Silva, *Every which Way but Loose – German Industrial Relations Since 1980*, in: Andrew Martin, George Ross et al., *The Brave New World of European Labour – European Trade Unions at the Millennium*, Oxford 1999, p. 75ff. (p. 99); Wildcat Zirkular, 35-Stunden-Woche: Weniger Lohn und mehr Arbeit, <http://www.wildcat-www.de/zirkular/48/z48azver.htm>, last accessed September 27th, 2005; Tarifarchiv der Hans-Böckler-Stiftung, Stationen der Tarifpolitik -80er Jahre: Arbeitszeitverkürzung und qualitative Tarifpolitik, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-A1A41265/hbs/hs.xsl/559_16602.html, last accessed September 30th, 2005.

door towards flexibility had been opened and from now on employers would only agree to further reductions in working hours in exchange for more flexibility¹⁷⁴. Criticism from the radical left included the fact that reduction of working time was often bought with the cut of other privileges such as paid breaks and wage rises; it also reproached unions for including the idea of flexibility from the beginning on in their proposal for a 35-hour week - unions were accused of playing into the hands of capital¹⁷⁵.

Collective agreements in the 1980s were, apart from the hot topic of reduction in working time, mostly characterized by “qualitative issues”, even though a lot of the goals set by union could be, if at all, only partly accomplished¹⁷⁶. However, early retirement regulations for the chemical industry, food, construction, banking trade and insurance were achieved 1984; and in 1988 the first uniform agreement on pay for blue- and white-collar workers alike in a major branch of industry (the chemical industry) were agreed¹⁷⁷.

¹⁷⁴ Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p.129; Tarifarchiv der Hans-Böckler-Stiftung, Stationen der Tarifpolitik -80er Jahre: Arbeitszeitverkürzung und qualitative Tarifpolitik, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-A1A41265/hbs/hs.xsl/559_16602.html, last accessed September 30th, 2005.

¹⁷⁵ Wildcat Zirkular, 35-Stunden-Woche: Weniger Lohn und mehr Arbeit, <http://www.wildcat-www.de/zirkular/48/z48azver.htm>, last accessed September 27th, 2005.

¹⁷⁶ Tarifarchiv der Hans-Böckler-Stiftung, Stationen der Tarifpolitik -80er Jahre: Arbeitszeitverkürzung und qualitative Tarifpolitik, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-A1A41265/hbs/hs.xsl/559_16602.html, last accessed September 30th, 2005.

“Qualitative issues” included the further development of protection against rationalization, a reformation of the system of differentiation in remuneration, improvements in health and ecology and rules regarding further education policies of companies (*betriebliche Qualifizierungs- und Weiterbildungspolitik*).

(Hans-Böckler-Stiftung, cit. opp.)

¹⁷⁷ Tarifarchiv der Hans-Böckler-Stiftung, Stationen der Tarifpolitik -80er Jahre: Arbeitszeitverkürzung und qualitative Tarifpolitik, http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-A1A41265/hbs/hs.xsl/559_16602.html, last accessed September 30th, 2005.

United Kingdom after 1984

The 1988 Employment Act further undermined the closed shop. Industrial action in order to install or defend it was rendered illegal, regardless of whether a ballot had been held or not. Consequently, even in closed shops approved by a ballot, dismissal of non-union employees was made unlawful. Members were given the right to take their union to court for industrial action taken without a ballot and disciplinary measures against members refusing to take part in industrial action were made unlawful.

The 1990 Employment Act staged another attack on the closed shop by giving ground to a complaint to an Industrial Tribunal for discriminating on grounds of union-membership when hiring workers. A closed-shop agreement itself, however, could still be lawful.

Secondary action was rendered illegal, and unions were held responsible for unofficial strike action, unless they had expressly disallowed it. Unofficially striking workers could be collectively dismissed and action taken on their behalf did not enjoy immunity.

The most important change for trade unions in the 1993 Trade Union Reform and Employment Rights Act – the last piece of employment legislation to be enacted by the Conservative government before Labour's return to power in 1997 - was the requirement to obtain written permission from members every three years for checking-off of dues. This was to be repealed by Labour in 1998. Furthermore, regulations on balloting for industrial action were strengthened and Fair Wage Councils abolished¹⁷⁸.

¹⁷⁸ John T. Addison, W. Stanley Siebert, *Changes in Collective Bargaining in the UK*, IZA Diskussion Paper No. 562, Bonn 2002, p. 7 and 48f. Available on-line from www.iza.org.

Legislation regarding unions has worsened substantially, but it has been suggested that the new rules were rarely used, and if, “mainly in those industries with a history of bad industrial relations”¹⁷⁹.

Real wages have risen since 1979 and there seems to be little evidence from aggregate or sectoral level analysis of wages of any major decline in the bargaining power of unions¹⁸⁰. However, collective bargaining since Thatcher has focussed more on pay; and, due to demands by management, wage rises have increasingly only been given in exchange for productivity or flexibility deals. Levels of employment have been negotiated less often but there has been a move away from national level multi-employer bargaining towards single employer bargaining at company level¹⁸¹. A fall in industrial action and picketing could be observed, but this was partly due to the fact that the Department of Employment didn't record any stoppages less than three days and a lot of industrial action now was rather short¹⁸².

Marsh has held that, although the political role of unions had been transformed so that unions were rarely consulted by Government and had very little political influence, shop floor relations seem to have remained relatively unchanged with little evidence of a major move towards derecognition. However, while there was no major decline in coverage, the scope and content of collective agreements have changed¹⁸³. While

¹⁷⁹ Essex Papers in Politic and Government, No 79: David Marsh, Trade Unions under Mrs Thatcher: Loss without Limit?, Essex 1991, p. 8.

¹⁸⁰ Essex Papers in Politic and Government, No 79: David Marsh, Trade Unions under Mrs Thatcher: Loss without Limit?, Essex 1991, p. 18.

¹⁸¹ Neil Millward, Mark Stevens, British Workplace Industrial Relations 1980 – 1984 – The DE/ESRC/PSI/ACAS Surveys, Aldershot 1986, p. 231ff, 246ff.; Essex Papers in Politic and Government, No 79: David Marsh, Trade Unions under Mrs Thatcher: Loss without Limit?, Essex 1991, p. 14.

¹⁸² Essex Papers in Politic and Government, No 79: David Marsh, Trade Unions under Mrs Thatcher: Loss without Limit?, Essex 1991, p. 16f.

¹⁸³ Essex Papers in Politic and Government, No 79: David Marsh, Trade Unions under Mrs Thatcher: Loss without Limit?, Essex 1991, p. 27.

significantly fewer strikes and picketing occurred, the influence on legislation is hard to determine and it was suggested that it is

“history and current state of relations between capital and labour within a given company which has most effects on the institutions and outcomes of industrial relations in that company. In the private sector at least, the Government can only influence the legal framework and the ideological context within which industrial relations occurs; this is an important influence, but it is an indirect one¹⁸⁴”.

However, contrary to Marsh’s impression, data indicates a clear drop in recognition, especially in the private sector¹⁸⁵, to be seen in Graph 3 at the end of this chapter.

¹⁸⁴ Essex Papers in Politic and Government, No 79: David Marsh, Trade Unions under Mrs Thatcher: Loss without Limit?, Essex 1991, p. 27.

¹⁸⁵ There did occur a drop in the level of union density from 58.9% in 1978 to 46.5% in 1987 and from 54.5% to 38.7% in TUC affiliated unions; the fall has mostly been in the private sector while the public sector remained largely unscathed. This decline has been attributed to the change in legislation under Thatcher by Freeman and Pelletier, while Metcalf held a combination of five factors responsible: the macro-economic climate, the composition of jobs and the workforce, the policy of the state, the attitudes and conduct of employers and the stance taken by unions themselves (Richard Freeman, Jeffrey Pelletier, The Impact of Industrial Relations Legislation on British Union Density, *in*: British Journal of Industrial Relations, Vol.28, No. 2, p. 141ff. (p. 155); Essex Papers in Politic and Government, No 79: David Marsh, Trade Unions under Mrs Thatcher: Loss without Limit?, Essex 1991, p. 12, 23).

The decline in recognition seems to be less significant with a sample by Millward and Stevens showing that in 1980 64% of the surveyed companies recognised unions and 66% did so in 1984. While those numbers show an increase in recognition (to be reversed by 1990) there is some evidence for a rise in derecognition as well. Claydon identified 49 cases of derecognition in 1987/88. However, the Labour research Study was able to conclude that “in general ... outside specific sectors like publishing, the unions report that recognition is not yet a major threat although a new and growing phenomenon” (Tim Claydon, Union Derecognition in Britain in the 1980s, *in*: British Journal of Industrial Relations, Vol. 7, No. 2, p. 214Ff (p. 214); Neil Millward, Mark Stevens, British Workplace Industrial Relations 1980 – 1984 – The DE/ESRC/PSI/ACAS Surveys, Aldershot 1986, p. 63, table 3.5; New Wave Union Busting, *in*: Labour Research, Vol. 77, No. 4, p. 13ff. (p. 13); Essex Papers in Politic and Government, No 79: David Marsh, Trade Unions under Mrs Thatcher: Loss without Limit?, Essex 1991, p. 13).

Against this background, Marsh's analysis that shopfloor relations remained largely unscathed appears doubtful. After all, representation relied mostly on recognised unions and shop stewards, who wouldn't be present in derecognised workplaces.

His assumption of no major decline in coverage appears disputable as well, seeing that the percentage of workers covered by collective agreements dropped from 86 percent in 1984 to 75 percent in 1990 and to 67 percent in 1998¹⁸⁶. Additionally, those numbers only apply to workers in workplaces with recognised unions, so that the overall decline must have been even more dramatic. While it is clear that the Thatcher administration and its legislation has had a negative influence on unions, other factors for the decline of unions have to be acknowledged as well.

It is important to note this decline of union power started before Thatcher even came to power. Unions had been integrated under the Heath administration and this continued under the succeeding Labour Government. The period from February 1974 to June 1975 had seen intensive co-operation between unions and Government within the Social Contract. Things began to change in 1975 when the Social Contract began to resemble little more than an incomes policy. Economic necessities brought the Government to adopt, against the opposition of the TUC a more monetarist and less corporatist economic policy, thus gradually excluding unions from political influence¹⁸⁷.

Another factor was the economic decline beginning after 1973. The de-industrialisation that went with it accounted for mass unemployment and a change in the structure of the workforce (see Chapter IV). Since unions traditionally have been particularly strong in the manufacturing sector that suffered the greatest loss of jobs, a decline in union

¹⁸⁶ Neill Millward, Alex Bryson, John Forth, *All Change at Work? British Employment Relations 1980 – 1998*, as portrayed by the Workplace Industrial Relations Survey Series, London 2000, p. 160, Table 5.8.

¹⁸⁷ Dave Marsh, Jeff King, *The Trade Unions under Thatcher*, Essex Papers in Politics and Government, Number 27, Essex 1985, p. 2, 29ff; Dave Marsh, *Trade Unions under Mrs Thatcher – Loss without Limit?* Essex Papers in Politics and Government, Number 79, Essex 1991, p. 5.

membership numbers has been the consequence. This in turn lead to weaker unions and less solidarity among workers¹⁸⁸. New jobs did accrue, sometimes, but mostly in smaller towns with different terms for unionism. In the traditional union strongholds in the industrial cities, work and life were intertwined, while in the new workplaces the workforce tends to live more scattered, thus minimising the potential for unionism to become a part of their lives, not just their jobs. Militancy, or just identification with one's union, thus is harder to achieve. Also, workplaces now tend to be smaller, and as unionisation and organisation tend to increase with size (larger plants are more likely to have shop stewards, conveners and the like), this too has an adverse effect on unionism. Unions therefore became more vulnerable to attacks from employers and Government so that Thatcher's anti-union politics and the anti-union climate they created could have full effect¹⁸⁹.

Thatcher therefore started her attack on the unions at a time when those were already weakened. After 1979, there have been less meetings between Government and unions and fewer of these meetings were initiated by Government. Also, if such meetings took place, unions were less able to wield any influence on Government politics than they did under predeceasing Labour governments¹⁹⁰. The Government took a tougher stance towards industrial action in the public sector and usually made clear that it was willing to resist industrial action and was prepared to do so for a long time, if necessary. Indeed, only two major disputes could be won by unions in the early 1980s.¹⁹¹ This rigid

¹⁸⁸ Dave Marsh, Jeff King, *The Trade Unions under Thatcher*, Essex Papers in Politics and Government, Number 27, Essex 1985, p. 36f., 41.

¹⁸⁹ Dave Marsh, Jeff King, *The Trade Unions under Thatcher*, Essex Papers in Politics and Government, Number 27, Essex 1985, p. 41, 45, 49.

¹⁹⁰ Dave Marsh, *Trade Union under Mrs Thatcher – Loss without Limit?* Essex Papers in Politics and Government, Number 79, Essex 1991, p. 5f; Dave Marsh, Jeff King, *The Trade Unions under Thatcher*, Essex Papers in Politics and Government, Number 27, Essex 1985, p. 2.

¹⁹¹ Martin Holmes, *The First Thatcher Government 1979 – 1983 – Contemporary Conservatism and Economic Change*, Boulder, Colorado 1985, p. 140ff, 147.

Those were the miners' strike threat in 1981 against NCB's plans to close 23 pits and the strike of the

position discouraged militancy by unions, giving them “the impression that it was not worthwhile for strike action to take place, because such action would not succeed”¹⁹², which was most obviously demonstrated in the miners' dispute of 1984/85. Additionally, Government also managed to avoid industrial action by appealing to members above the heads of union leaders. Consequently, during the miners' strike, members who wanted to stay at work made use of the new legislation and took their union to court ¹⁹³.

Finally, weakening of unions was facilitated by unemployment. Apart from all other post-war governments, Thatcher did not pursue a full-employment policy. Quite the contrary, the pursued monetarist policy had the effect of rising unemployment and some ministers admitted to clandestine delight at the connected weakening of unions¹⁹⁴. So while Thatcher did play a major part in the unions' decline, other factors have been influential as well.

1997 and beyond

While the new Labour Government largely upheld Conservative legislation on industrial action, it did relax strike ballots a little and strengthened protection against unfair dismissals of legally striking workers, requiring the employer to show that “reasonable procedural steps to resolve the dispute have been undertaken – and even then only eight weeks after the striker has been on strike.” At the same time, there is no qualifying service period for claims of unfair dismissal because of strike. Thus strikers

water-workers in 1983 (Holmes, cit. Opp., p. 140, 147)

¹⁹² Martin Holmes, *The First Thatcher Government 1979 – 1983 – Contemporary Conservatism and Economic Change*, Boulder, Colorado 1985, p. 147.

¹⁹³ Alastair J. Reid, *United We Stand – A History of Britain's Trade Unions*, London 2004, p. 404f.

¹⁹⁴ Alastair J. Reid, *United We Stand – A History of Britain's Trade Unions*, London 2004, p. 399.

are better protected against court action¹⁹⁵.

True to Labours' aim to introduce statutory recognition procedures, Schedule A1 was added to TULRCA 1992 through the ERA 1999, coming into effect in June 2000¹⁹⁶. Applying to workplaces with more than 20 employees, the procedures allow for an application to the CAC if a union request for recognition is not successful. The CAC then has to decide on the appropriateness of the (proposed) bargaining unit and whether a majority of workers in that unit support the union. If a majority of workers are union members, recognition will automatically be awarded; otherwise, a secret ballot will be held¹⁹⁷.

The regulations have been subject to criticism. They can only be invoked in workplaces with more than 21 employees; this might be problematic since smaller workplaces are less likely to recognise unions in the first place. While recognition is only available to independent unions there is a limited range of issues for negotiation under statutory recognition. Finally, the threshold for recognition is rather high: if a ballot is held, the union must win not only a majority of those voting, but 40% approval of the workforce as a whole¹⁹⁸.

¹⁹⁵ John T. Addison, W. Stanley Siebert, Changes in Collective Bargaining in the UK, IZA Diskussion Paper No. 562, Bonn 2002, p. 21, 23. Available on-line from www.iza.org. Linda Dickens, Mark Hall, Fairness – up to a Point. Assessing the Impact of New Labour's Employment Legislation, *in*: Human Resource Management Journal, Vol. 16, No. 4, p. 338ff. (340).

¹⁹⁶ David Antill, The Effect of the Employment Relations Act 1999 on Trade Union Activity, *in*: New Law Journal, Vol. 150, No. 6961, p. 1744ff.; Bob Simpson, Trade Union Recognition and the Law, a New Approach – Part I and II of the Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, *in*: Industrial Law Journal, Vol. 29, No. 3, p. 193ff. (p. 193).

¹⁹⁷ John T. Addison, W. Stanley Siebert, Changes in Collective Bargaining in the UK, IZA Diskussion Paper No. 562, Bonn 2002, p. 21f. Available on-line from www.iza.org.

¹⁹⁸ Bob Simpson, Trade Union Recognition and the Law, a New Approach – Part I and II of the Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, *in*: Industrial Law Journal, Vol. 29,

Still, statutory procedures are now available and were held to have a positive effect on union recognition, both prior to and after their enactment. However, this was believed to be due more to a “shadow effect” of the legislation, symbolising a different climate for industrial relations that encourages (voluntary) recognition agreements, than its actual use. At the same time, the change in Government provided for a more positive attitude to trade unions¹⁹⁹. Unions reported a “change in climate”, believing that employers were more “receptive to union involvement”. Beside the factors mentioned above, this change was also attributed to opportunistic motives like employers regarding union agreements as advantage in the competition for public contracts under a Labour Government²⁰⁰. Consequently, recognition prompted by the new legislation has to a great extent been voluntarily (to an extent that most seem to regard the statutory procedures only as the last resort), having the advantage for employers that these are able to “shape agreements and minimize conflict”²⁰¹. In fact, advancing voluntary

No. 3, p. 193ff (p. 195ff., 212).

¹⁹⁹ Linda Dickens, Mark Hall, Fairness – up to a Point. Assessing the Impact of New Labour's Employment Legislation, *in*: Human Resource Management Journal, Vol. 16, No. 4, p. 338ff. (342); Jo Blanden, Stephen Machin, John Van Reenen, Have Unions Turned the Corner? - New Evidence on Recent Trend in Union Recognition in UK Firms, *in*: British Journal of Industrial Relations, Vol. 44, No. 2, p. 169ff. (p. 184).

²⁰⁰ Sarah Oxenbridge, William Brown, Simon Deakin, Cilff Pratten, Initial Responses to the Statutory Recognition Provisions of the Employment Relations Act 1999, *in*: British Journal of Industrial Relations, Vol. 41, No. 2, p. 315ff. (p. 324).

²⁰¹ Sarah Oxenbridge, William Brown, Simon Deakin, Cilff Pratten, Initial Responses to the Statutory Recognition Provisions of the Employment Relations Act 1999, *in*: British Journal of Industrial Relations, Vol. 41, No. 2, p. 315ff. (p. 316, 324).

A study found that of 444 applications for recognition under the statutory procedures that reached the CAC until 2005, only 46 resulted in union recognition without a ballot. In 110 cases a ballot was held with unions being successful in 70. However, where recognition has been brought about by the legislations, a survey by Moore et. al. found employers stating that positive relationships with union representative had developed (Paul Smith, Gary Morton, Nine Years of New Labour: Neoliberalism and Workers' Rights, *in*: British Journal of Industrial Relations, Vol. 44, No. 3, p. 401ff. (p. 406); Linda Dickens, Mark Hall, Fairness – up to a Point. Assessing the Impact of New Labour's Employment Legislation, *in*: Human Resource Management Journal, Vol. 16, No. 4, p. 338ff.

agreements has been a central goal of the regulations; its importance lying in a transformation of negotiations between unions and employers since both sides are aware that the union can resort to statutory procedures²⁰². Gall stated that “the CAC will not intervene, *ie* accept an application, unless the union can show clear evidence of it seeking a voluntary approach first²⁰³”.

Agreements stemming from voluntary recognition are often restricted to the issues provided for statutory recognition (pay, hours and holidays)²⁰⁴.

A survey by Blanden et. al. in 2002 found a sharp increase in recognition agreements after 1997 but most of the new recognition occurred in places where unionisation was high to begin with, therefore the likelihood of this trend continuing might be small²⁰⁵.

Another survey found that recognition rose between 1999 and 2001 and before declining again²⁰⁶. WERS 2004 reported that 27 percent of workplaces recognised trade unions, compared to 33 percent in 1998²⁰⁷. This has been attributed to the fact that,

(343)).

²⁰² Jo Blanden, Stephen Machin, John Van Reenen, Have Unions Turned the Corner? New Evidence on Recent Trends in Union Recognition in UK Firms, *in*: British Journal of Industrial Relations, Vol. 44, No. 2, p. 169ff. (p. 170f.).

²⁰³ Gregor Gall, British Employer Resistance to Trade Union Recognition, *in*: Human Resource Management Journal, Vol. 14, No. 2, p. 36ff. (p. 39)

²⁰⁴ Linda Dickens, Mark Hall, Fairness – up to a Point. Assessing the Impact of New Labour's Employment Legislation, *in*: Human Resource Management Journal, Vol. 16, No. 4, p. 338ff. (p.343).

However, there was also suspicion that recognition did not have any measurable effect on firms since unions are no longer powerful enough to influence firms' decisions (Jo Blanden, Stephen Machin, John Va. Reenen, Have Unions Turned the Corner? - New Evidence on Recent Trend in Union Recognition in UK Firms, *in*: British Journal of Industrial Relations, Vol. 44, No. 2, p. 169ff. (p. 185ff.)).

²⁰⁵ Jo Blanden, Stephen Machin, John Van Reenen, Have Unions Turned the Corner? - New Evidence on Recent Trends in Union Recognition in UK Firms, *in*: British Journal of Industrial Relations, Vol. 44, No. 2, p. 169ff. (p. 185ff.).

²⁰⁶ Gregor Gall, British Employer Resistance to Trade Union Recognition, *in*: Human Resource Management Journal, Vol. 14, No. 2, p. 36ff. (p. 49).

²⁰⁷ Linda Dickens, Mark Hall, Fairness – up to a Point. Assessing the Impact of New Labour's Employment Legislation, *in*: Human Resource Management Journal, Vol. 16, No. 4, p. 338ff. (342).

while unions initially were successful in signing a number of agreements using “strong cases”, once these strong cases had been used up, they were left with anti-union employers from which recognition was much harder to win²⁰⁸. However, most of the decline occurred in workplaces with less than 25 employees, so the new regulations are unlikely to change this phenomenon. It was also found that recognition in areas without at least some tradition of unionisation was rare; most workers newly covered either worked in a workplace with some recognition already prevalent or in a sector with traditional union presence²⁰⁹. Consequently, new recognition was found to be most likely in manufacturing firms²¹⁰.

Oxenbridge et al. attributed the changes in recognition less to the new regulations, rather they held that these have had the effect “of speeding up a process of managed trade union recognition, re-recognition or (in some workplaces) exclusion that had already got well under way during the 1990s”, coming to the conclusion that

“collective representation of workers is expanding once again. It is true that, on the whole, this takes the form not of traditional collective bargaining, but rather of consultative and representational arrangements that are less dependent than in the past upon the potential for collective worker action. The 1999 Act and the drift of EU influence have accelerated the rate at which employers are redesigning their relationships with unions”²¹¹.

²⁰⁸ Gregor Gall, British Employer Resistance to Trade Union Recognition, *in*: Human Resource Management Journal, Vol. 14, No. 2, p. 36ff. (p. 49).

²⁰⁹ Linda Dickens, Mark Hall, Fairness – up to a Point. Assessing the Impact of New Labour's Employment Legislation, *in*: Human Resource Management Journal, Vol. 16, No. 4, p. 338ff. (342).

²¹⁰ Jo Blanden, Stephen Machin, John Van Reenen, Have Unions Turned the Corner? New Evidence on Recent Trends in Union Recognition in UK Firms, *in*: British Journal of Industrial Relations, Vol. 44, No. 2, p. 169ff. (p. 178).

²¹¹ Sarah Oxenbridge, William Brown, Simon Deakin, Cilff Pratten, Initial Responses to the Statutory Recognition Provisions of the Employment Relations Act 1999, *in*: British Journal of Industrial Relations, Vol. 41, No. 2, p. 315ff. (p. 331).

The ERA 2004 amended the statutory recognition procedures, mainly by granting unions better access to workers. Additionally, the CAC is now requested to consider management's view when deciding on the appropriate bargaining unit and pay now does not include pensions²¹².

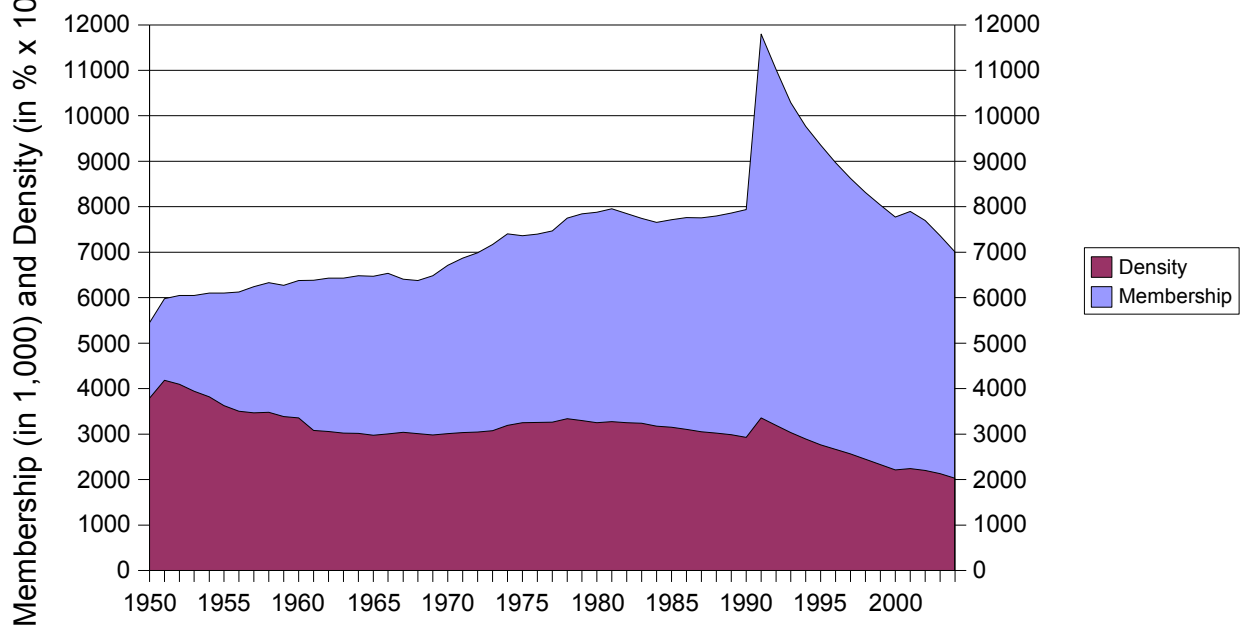
Labour has made other changes in the field of industrial relations: important examples are the introduction of the National Minimum Wage in 1999 and reversion of the opt-out from the Maastricht social chapter. Both measures strengthened the role of the law in industrial relations.

²¹² Paul Smith, Gary Morton, Nine Years of New Labour: Neoliberalism and Workers' Rights, *in*: British Journal of Industrial Relations, Vol. 44, No. 3, p. 401ff. (p. 407f.).

Graphs

Graph I

Trade Union Membership and Density in Germany (DGB only)



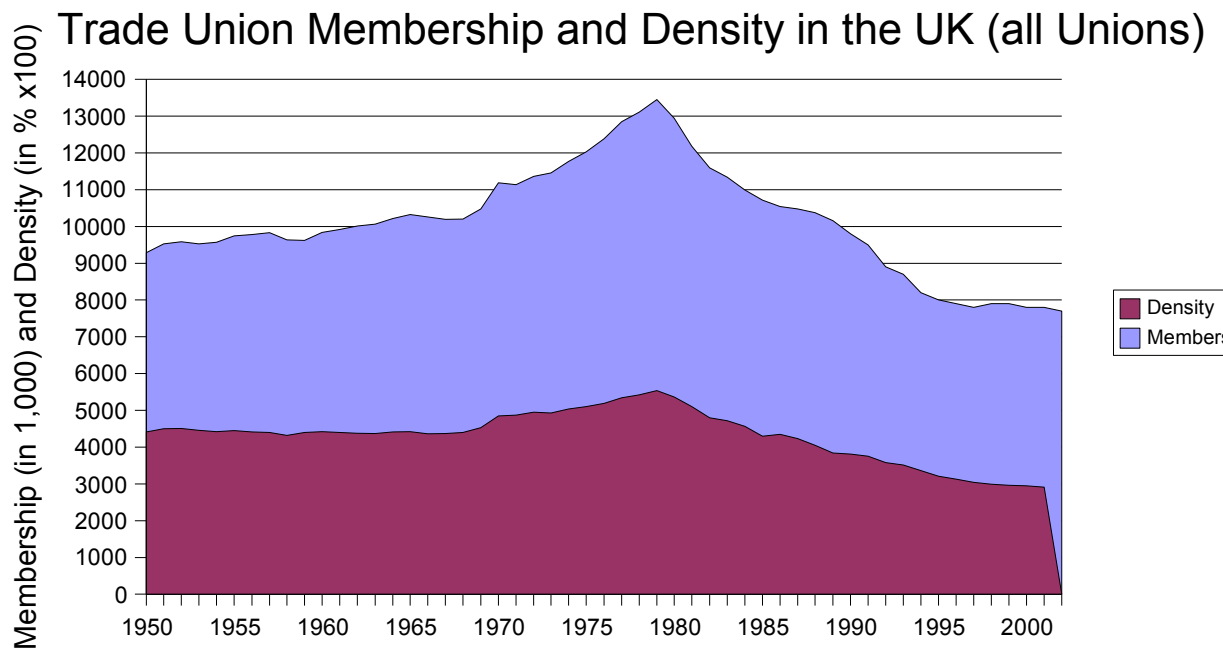
(Data from: Forschungsgruppe Weltanschauungen in Deutschland, Gewerkschaftsmitglieder DGB 195 – 2005, available on-line at http://www.fowid.de/fileadmin/datenarchiv/Gewerkschaftsmitglieder_DGB__1950-2005.pdf)

The steep rise in membership in the early 1990s is attributable to German unification.

While the DGB initially gained about 3 million new members, 50% of the total eastern German workforce, about half of those left the DGB-union in the next 6 years. Reasons have been found in a vast reduction of jobs due to privatisation and resulting high unemployment, de-industrialisation and the end of the building boom that commenced immediately after unification. Women have been ousted from the labour market (the rate of female employment has been significantly higher in the GDR than in the Federal Republic) and older workers have been sent to early retirement. Unions, at the same time, failed to orientate their agendas towards the different needs of workers in the New Laender²¹³.

²¹³ Bernhard Ebbinghaus, Dinosaurier der Dienstleistungsgesellschaft? Der Mitgliederschwund deutscher

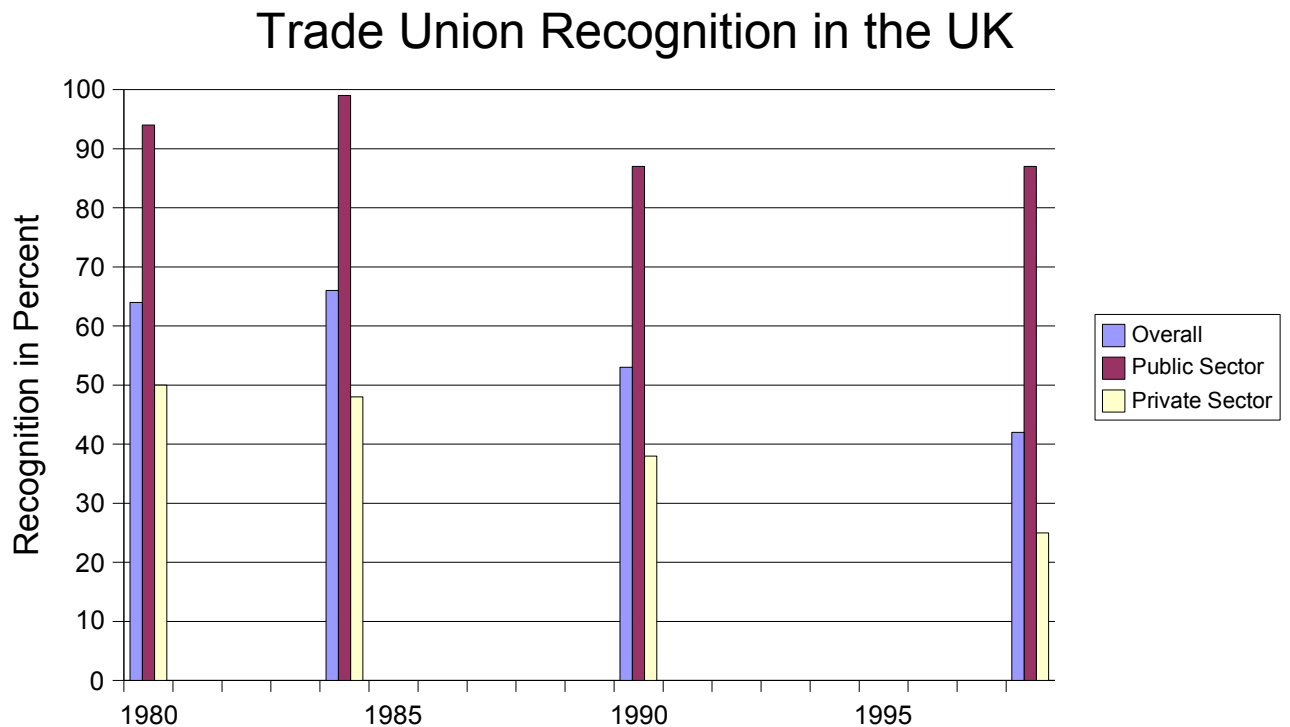
Graph II



Data from Alan Campell, Nina Fishmann, John McIlroy, *British Trade Unions and Industrial Politics – The Post-War Compromise, 1945 – 64*, p. 103 (Table 3.2); Alan Campell, Nina Fishmann, John McIlroy, *British Trade Unions and Industrial Politics – The High Tide of Trade Unionism, 1964-79*, p. 120 (Table 4.1); Department of Trade and Industry, <http://www.dti.gov.uk/files/file12479.pdf>, last accessed January 22nd, 2006; John McIlroy, *Trade Unions in Britain Today*, Manchester 2002, p. 201 (Table 8), Jens Peter Frølund Thomsen, *British Politics and Trade Unions in the 1980s: Governing Against Pressure*, Aldershot 199, p. 176 (Table 6.2).

A decline in membership and density since 1979 can be observed.

Gewerkschaften im historischen und internationalen Vergleich, MPIfG-Working Paper 02/3, 2002.
Available on-line at http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp02-3/wp02-3.html#3_2%20Mitgliederschwund.



Data from Neil Millward, Alex Bryson and John Forth, *All Change at Work – British employment Data Relations 1980 – 1998*, as portrayed by the Workplace Industrial Relations Survey Series, London 2000, p. 96 (Table 4.5)

No data for recognition before 1980 or after 1998 was available. Still, a vast decline in recognition in the private sector can be observed while the decline in the public sector has been less dramatic. There is no system of recognition similar to the British in Germany, therefore no figures are presented²¹⁴.

²¹⁴ Collective agreements in Germany are predominantly conducted at industry level and are binding between the members of the parties; that is, the union members and the members of the employers' association. Individual employers might therefore be bound by agreements without ever having negotiated with a union. At the same time, figures for membership in employers' associations or for companies bound by agreements would not present data comparable to recognition in the UK, since many employers apply terms of collective agreements without being member of an employers' association.

Chapter II

Chapter II will deal with the second channel of industrial relations, workers' representation by other means than trade unions. While in Germany a second channel is long established (and will be dealt with in the first part of this chapter), the UK traditionally adhered to a principle of single channel, relying wholly on trade unions. The second part of Chapter II will deal with developments in the UK – mostly brought about by EC law – towards non-union representation. While it will be held that a second channel is emerging, the British system still seems a far cry from the strongly divided German one.

Part I – Works Councils in Germany

A dual system of interest representation and assertion of collective rights with unions outside of and works councils within the plant is a specific feature of the German industrial relations system.

The two actors are technically separated, but in fact there are numerous instances of co-operation and their development is integrated with one another. The focus of the thesis is mainly on trade unions, therefore their relationship to councils is important to fully understand their development and to gain a full picture of the system of collective rights in German industrial relations.

This part will provide an overview on the history of works councils and how the development of this institution influenced the development of the union movement.

Early Beginnings

Representation in the 19th century was done solely by unions, having been legalised in 1869. They provided the only channel for an improvement of workers' employment and living conditions²¹⁵.

First attempts at permanent representation structures in the workplace failed or had little effect²¹⁶. Although there had been sporadic instances of works council-like structures, the vast majority of enterprises operated under the maxim of 'master in the house' (a concept that might be linked to the English principle of 'freedom of contract'). Social Democrats and unions then were opposed to workers committees; Social Democrats perceiving them as 'fig leaf of capitalism' and unions fearing a fragmentation of their movement²¹⁷.

²¹⁵ Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition, Baden-Baden 2000, p. 47.

Although they had been legalised with the abandonment of the prohibition of coalition in 1869 through §§ 152, 153 of the *Gewerbeordnung*, they still encountered numerous obstructions and retaliatory measures by employers and state. Nevertheless, a collective agreement of 1890 first recognised *gewerkschaftliche Vertrauensleute* in the plant (Däubler, cit. opp., p. 47)

²¹⁶ The *Frankfurter Nationalversammlung* conferred in 1848 on a draft proposal of a *Gewerbeordnung*, including a factory council, albeit without result. The *Frankfurter Nationalversammlung* was the first freely elected parliament comprising all of Germany. It drafted a constitution after the 1848 revolution, which, due to the refusal of Prussia's King Friedrich Wilhelm IV to accept the Kaiser's crown, was never enacted. In 1891, the *Arbeiterschutzgesetz* provided for voluntary worker committees but had little practical effect (Wikipedia, *Frankfurter Nationalversammlung*, http://de.wikipedia.org/wiki/Frankfurter_Nationalversammlung, last accessed April 30th, 2006; Reinhard Richardi, Gregor Thüsing, Georg Annuß, *Betriebsverfassungsgesetz mit Wahlordnung – Kommentar*, 9th Edition, München 2004, p. 54ff; Gerrick von Hoyningen-Huene, *Betriebsverfassungsrecht*, 3rd Edition, München 1993, p. 11; Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition, Baden-Baden 2000, p. 48.)

²¹⁷ Reinhard Richardi, Gregor Thüsing, Georg Annuß, *Betriebsverfassungsgesetz mit Wahlordnung – Kommentar*, 9th Edition, München 2004, p. 57.

First World War – 1945

First World War

A law of 1916 made workers' committees (albeit with only insignificant rights of co-determination) obligatory for all *kriegswichtige*²¹⁸ plants with more than 50 employees²¹⁹.

Revolution 1918

The idea of councils played an important role in the revolution of 1918. While revolutionary sentiment had long been ripe²²⁰, the revolution itself was set off by

It has been suggested that those entrepreneurs that allowed for *Fabrikausschüsse* (factory councils) did so for three reasons: first, they hoped for a harmonisation of relations in the enterprise; secondly, for a softening of social effects of industrialisation and thirdly, they hoped to keep the unions at bay (Gloria Müller, *Zwischen Betriebsgemeinschaft und Betriebsdemokratie – Aus der Geschichte des Betriebsverfassungsgesetzes*, in: *Die Mitbestimmung* 1988, p. 301ff. (p. 301)).

²¹⁸ Literally 'important for the war'; might be translated as 'strategic'.

²¹⁹ Gerrick von Hoyningen-Huene, *Betriebsverfassungsrecht*, 3rd Edition, München 1993, p. 11; Reinhard Richardi, Gregor Thüsing, Georg Annuß, *Betriebsverfassungsgesetz mit Wahlordnung – Kommentar*, 9th Edition, München 2004, p. 55.

These regulations and its participation rights, especially the realisation of these rights by way of councils, can be traced back to the French anarchist Proudhon (v. Hoyningen-Huene, *opp. cit.*).

²²⁰ Prior to the November revolution 1918, mass strikes had broken out in Berlin and the Ruhr district (at that time still predominantly characterised by mining and steel industry, therefore a working class region par excellence). Taking place at the end of January/early February 1918, about 800,000 workers participated, led by highly organised metal-industry *Obleute* (a form of shop-steward), which had ceased to support government's policies, as the metal workers' union was still doing. The *Obleute* therefore constituted a "militant opposition to the official trade unions".

Strikers demanded peace and workers' representation in peace negotiations, making it a political rather than an economical strike. In Berlin workers' councils were set up that demanded a general democratisation of the state and suffrage for all over 20 years of age,

the sailors' mutiny in Kiel and Wilhelmshaven. It soon spread to the mainland²²¹ and for some time, Germany was de facto ruled by councils²²². The council movement reached Berlin on November 9th, coinciding with a general strike, called the night before. By noon, the *Kaiser* had abdicated and before 1pm Friedrich Ebert (*SPD*) had been appointed as chancellor. The republic was proclaimed twice on this day: at 2pm by Social Democrat Phillip Scheidemann and at 4pm by Karl Liebknecht as "free socialist republic"²²³.

men and women alike. After government was only willing to negotiate with the strikes commission in Berlin if it was accompanied by official delegates of trade unions, the leaders decided to call off the strike. At this time most of the strikes in the rest of Germany had already been ended.

Those strikes can be seen as part of the general strike wave that swept through Europe in the winter of 1917/18, due to food shortages and the outrage on Germany's refusal of making peace with revolutionary Russia (Horst Möller, *Weimar – Die unvollendete Demokratie*, 3rd Edition, München 1990, p. 19; A. J. Ryder, *The German Revolution of 1918 – A Study of German Socialism in War and Revolt*, Cambridge 1967, p. 116f.).

²²¹ A. J. Ryder, *The German Revolution of 1918 – A Study of German Socialism in War and Revolt*, Cambridge 1967, p. 140.

On October 28th, 1918, the fleet was ordered to sail out in order to hinder British troops from reaching the Continent. However, since the British fleet by far outnumbered the German, any attempt to fight them must lead to defeat. Sailing out was equal to a suicide commando and, besides, even a victory could not have influenced the outcome of the war. Crews of battleships in Kiel and Wilhelmshaven refused order and did so again after the order was repeated on October 30th. The command was withdrawn and even though the sailors were arrested and imprisoned, they had won a moral victory.

(A. J. Ryder, cit. opp. p. 140)

²²² Simon Taylor, *Germany 1918 – 1933 – Revolution, Counter-Revolution and the Rise of Hitler*, London 1983, p. 7; A. J. Ryder, *The German Revolution of 1918 – A Study of German Socialism in War and Revolt*, Cambridge 1967, p. 148; Donny Gluckstein, *The Western Soviets – Workers' Councils versus Parliament 1915 – 1920*, London 1985, p. 108.

²²³ Simon Taylor, *Germany 1918 – 1933 – Revolution, Counter-Revolution and the Rise of Hitler*, London 1983, p. 8; Donny Gluckstein, *The Western Soviets – Workers' Councils versus Parliament 1915 – 1920*, London 1985, p. 115; Horst Möller, *Weimar – Die unvollendete Demokratie*, 3rd Edition, München 1990, p. 24f.

Weimar Republic

This *Rätebewegung*²²⁴ was mainly a political movement for which industrial democracy was just one aim among others²²⁵. Nevertheless, the *Tarifvertragsordnung*²²⁶ of December 23rd, 1918 was passed and provided for a general implementation of factory councils by making them compulsory in *Betrieben*²²⁷ with at least 20 employees, giving workers for the first time a legal right to participation²²⁸.

However, the defeat of the political council movement (the Weimar Republic was a parliamentary rather than a council republic) meant a restriction of councils to the shopfloor; consequently, Art 165 of the Weimar constitution regarded them merely as an economic principle with the first stage being works councils²²⁹.

²²⁴ Council movement.

²²⁵ Gerrick von Hoyningen-Huene, *Betriebsverfassungsrecht*, 3rd Edition, München 1993, p. 12; Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition, Baden-Baden 2000, p.50.

²²⁶ Regulation on collective agreements.

²²⁷ The translation of *Betrieb* is company, enterprise, shop or plant; however, under German law the term is defined as “organisational entity of means for work by means of which the employer, together with his employees, pursues one or several work-related ends”. A *Betrieb* is characterised by a uniform organisation, it is therefore crucial where the decision of the employer regarding the employees are taken (Manfred Löwisch, *Arbeitsrecht*, 7th Edition, Düsseldorf 2004, p. 122, Rn. 415ff.)

²²⁸ Reinhard Richardi (Ed), *Betriebsverfassungsgesetz mit Wahlordnung – Kommentar*, 10th Edition, München 2006, Einleitung Rn 10 (p. 55); Gerrick von Hoyningen-Huene, *Betriebsverfassungsrecht*, 3rd Edition, München 1993, p. 11.

²²⁹ Gerrick von Hoyningen-Huene, *Betriebsverfassungsrecht*, 3rd Edition, München 1993, p. 12; Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition, Baden-Baden 2000, p.50; Reinhard Richardi (Ed), *Betriebsverfassungsgesetz mit Wahlordnung – Kommentar*, 10th Edition, München 2006, Einleitung Rn 10 (p. 55). The middle stage of *Bezirksräte* (district councils) was never to come into being and the final stage came only about as a preliminary *Reichswirtschaftsrat* (Reich’s economy council) (Richardi, cit. opp., Rn. 10).

Works councils in Weimar eventually developed to be part of the union movement and an accepted means of representation of interests²³⁰, but initially, unions had been opposed²³¹. Carl Legien, chair of the general commission of unions in Germany and then most important union leader, explained:

“... councils would arrange terms and conditions according to the particular profitability of the *Betriebe* and would thus abandon the principle for which the unions fought for decades, that workers of stronger economical rank have to stand for those of economically weaker rank. Union structure would be eliminated without something equal taking its place.”²³²

The *Betriebsrätegesetz (BRG)*²³³ of 1920 guaranteed union influence over issues on the shop-floor²³⁴. Works councils were to be elected in all enterprises with more than 20 employees and given an independent function next to unions²³⁵.

²³⁰ Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition, Baden-Baden 2000, p. 51.

²³¹ Gerhard A. Ritter, Die Entstehung des Räteartikels 165 in der Weimarer Verfassung, *in*: *Historische Zeitschrift*, Vol. 258, No. 1, p. 73ff. (p. 85).

Carl Legien, union leader and SPD member (and in 1913 president of the international trade union confederation), voiced his opinion of the impossibility of integrating the councils in the frame of union organisation on a speech before union leaders in 1919 (Ritter, *cit. opp*, p. 85, Fn 36; wikipedia, Carl Legien, http://de.wikipedia.org/wiki/Carl_Legien, last accessed May 1st, 2006).

²³² Gerhard A. Ritter, Die Entstehung des Räteartikels 165 in der Weimarer Verfassung, *in*: *Historische Zeitschrift*, Vol. 258, No. 1, p. 73ff. (p. 86).

²³³ Law on Works Councils.

²³⁴ Otto Kahn-Freund, *Labour Law and Politics in the Weimar Republic*, Oxford 1981, p. 167f. It was clarified that collective agreements had priority to co-determination rights on plant level and works councillors were obliged to safeguard its application. Unions were given a right to take part in works council meetings and plant assemblies. The very existence of unions was furthermore secured by § 8 BRG that explicitly upheld the functions of unions next to councils (Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition, Baden-Baden 2000, p. 51).

²³⁵ Gerrick von Hoyningen-Huene, *Betriebsverfassungsrecht*, 3rd Edition, München 1993, p.

However, they were required to support the employer in *Erfüllung des Betriebszweckes*²³⁶ and to safeguard the plant from disruptions²³⁷. This clearly divided councils from the trade union movement (decidedly not expected to foster the profitability of the enterprise or to protect industrial peace), but in practice they were “prolonged arms of the unions”²³⁸. The fact that there was not much margin for wage negotiations at plant level and that the frequent strikes could not have been conducted without union support helped integrate councils into the union movement – in fact, council elections were generally carried out according to electoral lists supplied by the unions²³⁹.

Third Reich

Under Hitler the *Führerprinzip*²⁴⁰ was the all-encompassing doctrine. By law, a

12; Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition, Baden-Baden 2000, p.50;

²³⁶ Literally ‘fulfilling the purpose of the plant’.

²³⁷ Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition, Baden-Baden 2000, p. 50; Gloria Müller, *Zwischen Betriebsgemeinschaft und Betriebsdemokratie – Aus der Geschichte des Betriebsverfassungsgesetzes*, in: *Die Mitbestimmung* 1988, p. 301ff. (p. 301).

²³⁸ Flatow, *Gewerkschaften und Betriebsräte*, in; Kaskel (Ed.). *Koalition und Koalitionskampfmittel*, Berlin 1925, p. 157ff. (p. 165), quoted in: Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition, Baden-Baden 2000, p. 50; Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition, Baden-Baden 2000, p. 50.

²³⁹ Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition, Baden-Baden 2000, p. 51.

²⁴⁰ The *Führerprinzip* (literally ‘leader principle’) was a main principle of national socialistic Weltanschauung, applied not only in politics but also in economical and social life. It is based on a restructuring of power on strict order lines. Instead of democratic structures, *Führer* are given the power to govern on the principle of ‘order and obedience’, in fact blind obedience (*Führer befehl, wir folgen* – Leader, command and we will follow) is a main characteristic of the principle. All political power was concentrated in Hitler as the

*Betriebsführer*²⁴¹ was supposed to run the enterprise and lead the work force in his own responsibility. *Vertrauensräte*²⁴² were selected by the employer without employee participation in accordance with the NSDAP. They had only advisory functions²⁴³.

Unions had been annihilated by the national socialist government already on May 2nd, 1933²⁴⁴.

1945 – 1952

Councils played an important role in the rebuilding of German industrial relations. Initially, works councils constituted the primary organisation of workers and some plants were in fact governed by councillors. Since the aim of these first (and illegal) councils was the development of a strong and powerful union movement, many councillors later found their place as union officials. The importance of these first “unofficial” councils diminished with the emergence of organisational structures in enterprises, administration and especially unions, since neither the allied forces, nor union officials were willing to allow a “dual

most superior *Führer* (Bundeszentrale für politische Bildung, <http://www.bpb.de/publikationen/PY85WF,0,0,F%FChrerprinzip.html>, last accessed March 11th, 2006).

²⁴¹ Literally works manager.

²⁴² Literally trust councillors.

²⁴³ Gerrick von Hoyningen-Huene, *Betriebsverfassungsrecht*, 3rd Edition, München 1993, p. 12; Reinhard Richardi (Ed), *Betriebsverfassungsgesetz mit Wahlordnung – Kommentar*, 10th Edition, München 2006, Einleitung Rn 12 (p. 56).

Under the principle of ‘*Ein Volk, ein Reich, ein Führer* – a people, a country, a Führer’ a separate representation wasn’t necessary. The different class interests were supposed to be assimilated by the national interest; within the united German nation as holy principle there was no room for class antagonism.

²⁴⁴ Wikipedia, Gewerkschaft, <http://de.wikipedia.org/wiki/Gewerkschaften#Geschichte>, last accessed March 10th, 2006.

power” system of unions and strong councils²⁴⁵.

Even though councils did exist immediately after the war, they were only legalised through Law No. 22 of the Allied Control Commission in 1946 that allowed the first election of works councils. It was only a law providing guidelines and could thus, although valid throughout Germany, not establish a unitary system of workers’ representation. Councils were given a number of rights traditionally filled by unions, e.g. the right to confer with employers on the application of collective agreements; but no explicit co-determination rights. It required compulsory co-operation with “recognised unions”²⁴⁶, thus acknowledging their inter-cooperation²⁴⁷.

The *Länder*²⁴⁸ filled the frame with their own regulations, often providing for more extensive economic co-determination and aiming for a democratisation of management; those concepts, however, were soon abandoned by the British and

²⁴⁵ Theo Pirker, *Die blinde Macht – Die Gewerkschaftsbewegung in Westdeutschland: Erster Teil 1945 – 1952 – Vom ‚Ende des Kapitalismus‘ zur ‚Zähmung der Gewerkschaften‘*, München 1960, p. 32.

²⁴⁶ Otto Ernst Kempfen, Ulrich Zachert, *Tarifvertragsgesetz – Kommentar für die Praxis*, 3rd Edition, Köln 1997, p.60; Gerrick von Hoyningen-Huene, *Betriebsverfassungsrecht*, 3rd Edition, München 1993, p. 12; Reinhard Richardi (Ed), *Betriebsverfassungsgesetz mit Wahlordnung – Kommentar*, 10th Edition, München 2006, Einleitung Rn 13 (p. 56); Uwe Rosenthal, Matthias Loeding, *Stadien der Betriebsrätebewegung in der SBZ – eine Skizze*, in: *Beiträge zur Geschichte der Arbeiterbewegung* 1999, No 1, p. 35ff. (p. 49).

The term “recognised union” is to be understood differently from the British concept. While in Britain recognition depends on the employer, in Germany it is an objective characterisation of a union, depending on its size, independence and ability to take industrial action. The German words are *anerkannte Gewerkschaft*, which literally translates as “accepted” or “acknowledged union”.

²⁴⁷ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 72.

Unions however would have rather had the councils limited to definite rights than giving them negotiation leeway that might develop a momentum the unions didn't wish for. (Hermann Reichold, *Betriebsverfassung als Sozialprivatrecht – Historisch-dogmatische Grundlagen von 1848 bis zur Gegenwart*, München 1995, p. 362.)

²⁴⁸ The federal states in Germany are called *Länder*.

American powers²⁴⁹. The different regional systems and pressure by the Americans made it necessary to establish a national law on works councils after the foundation of the *Bundesrepublik* in 1949²⁵⁰.

BetrVG 1952

Prehistory and Development

A first draft was called a serious deterioration of the legal situation by the DGB; assuming that government's aim was to push unions out of the workplace²⁵¹.

²⁴⁹ Gloria Müller, Zwischen Betriebsgemeinschaft und Betriebsdemokratie – Aus der Geschichte des Betriebsverfassungsgesetzes, *in*: Die Mitbestimmung 1988, p. 301ff. (p. 303); Gemeinschaftskommentar zum Betriebsverfassungsgesetz, Band I, Einleitung, p. 69. Especially the law on works councils in Hesse (*Hessisches Betriebsrätegesetz*) gave strong rights to the unions: it copied the first paragraph of the BRG 1920, providing for the establishment of works councils, nearly word by word, but added that those rights should be operated „under inclusion of the unions“. The works council was furthermore empowered to co-determine in social, personnel and economic matters on equal footing with the employer *in consultation with the unions* (§ 30 I HessBRG). Even more, even works council agreements should only be concluded in cooperation with the unions (§ 35 I).

(Hermann Reichold, Betriebsverfassung als Sozialprivatrecht – Historisch-dogmatische Grundlagen von 1848 bis zur Gegenwart, München 1995, p. 364)

²⁵⁰ Gerrick von Hoyningen-Huene, Betriebsverfassungsrecht, 3rd Edition, München 1993, p. 12; Hanns Martin Schleyer, Zehn Jahre Betriebsverfassungsgesetz, *in*: Schriftenreihe Der Betrieb, Beiträge zum Betriebsverfassungsgesetz – 10 Jahre Betriebsverfassungsgesetz, Düsseldorf 1962, p. 9ff. (p. 10).

In his first government declaration, Chancellor Adenauer (Christian Democrats) proclaimed the new organisation of works constitution one of the most important tasks of legislation (von Hoyningen-Huene, cit. opp., p. 12 ; Schleyer, cit. opp. p. 10).

²⁵¹ Dieter Schuster, Die Deutschen Gewerkschaften seit 1945, 2nd Edition, Berlin 1973, p. 40f. The DGB formulated its politico-economical principles and its ideas for representation and participation on its founding congress in 1949; however, these were mainly concerned with co-determination rather than participation. The long term goal was an “economic system in which social injustices and economic affliction are eliminated and every person willing to work is assured of job and existence”. It regarded participation as a measure to reach this

However, the *Betriebsverfassungsgesetz (BetrVG)*²⁵² was passed against its opposition in 1952²⁵³.

Legal Details

The *BetrVG* brought a number of impairments when compared with Law No. 22 and the *BRG*. Councils now had fewer competences in hiring and firing, and ‘plant changes’ that required the employer to consult with the council were more narrowly defined. Councils’ duty to foster the economic well-being of the plant

goal; however, it should be restricted to union members: “Co-determination of all organised workers in all personnel, economical and social issues of economic leadership and economic arrangement (*Wirtschaftsführung und Wirtschaftsgestaltung*)”. Unions furthermore were to have a decisive influence in all supervisory and administrative bodies. However, even though those ideas show that unions rather advocated representation by unions than by elected representatives, these examples nevertheless regard co-determination and not works councils.

Other demands were for the socialisation of key industries and social justice by appropriate participation of all workers in the economic output. The DGB *Bundesvorstand* (federal committee) issued a declaration in its meeting on 10 April 1952 declaring the draft insufficient, especially regarding the intention to draft a special bill regarding representation of civil service employees. The managing committee was enabled to take all necessary measures to lend weight to the demand for a unified, progressive works constitution (Schuster, cit. Opp., p. 34ff., p. 40f.; (H. C. Nipperdey, *Die Ersatzansprüche für Schäden, die durch den von den Gewerkschaften gegen das geplante Betriebsverfassungsgesetz geführten Zeitungsstreik vom 27. – 29. Mai 1952 entstanden sind*, Köln 1953, p. 5f.).

The circumstances surrounding the development of the *BetrVG 1952* were very different to that of 1920. While employers in 1920 welcomed unions as a mean to stave off the more radical works councils, in the 1950s the tendency for employers was rather to try to keep unions out of the plant and thus trying to diminish workers' influence by concentrating on councils; not only by definition more factory-orientated and particularistic, but also by law forced to be more devoted to the wellbeing of the company than to the interests of the workers (in general). (Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 64, 75, 76.)

²⁵² Works Council Constitution Act.

²⁵³ Dieter Schuster, *Die Deutschen Gewerkschaften seit 1945*, 2nd Edition, Berlin 1973, p.41f.

and their autonomy from unions was stressed, thus weakening ties to unions. Furthermore, councils were made responsible for securing that no-one was discriminated against on grounds of union membership, thus forbidding a preferential treatment of union members. The obligation to safeguard the plant from disruption in the 1920 law was now extended to a prohibition to strike²⁵⁴. Unions therefore lost facilities to influence councils and establish a shop floor presence²⁵⁵.

Assessment

The *BetrVG 1952* was never used as widely as expected. When works councils were elected under its provisions for the last time in 1968, it was estimated that only about 25,000 of ca. 400,000 plants that were eligible held elections²⁵⁶.

Employers' side seemed to be contented, regarding it as a useful compromise, able to communicate its ideas onto the social partners. It was argued that the law

²⁵⁴ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 75f.

²⁵⁵ It is worth noting that union presence in works constitution can be derived from the constitution. Art 9 III GG provides for freedom of coalition and autonomy of collective bargaining (*Tarifautonomie*). However, while this doesn't give unions a monopoly on representation (see BVerfG, March 1st, 1979, 1 BvR 532/77, 1 BvR 533/77, 1 BvR 419/78, 1 BvL 21/78, 'Mitbestimmungsurteil' – Judgement on Co-Determination), a restriction by, for example, works councils is only admissible when the system of *Tarifautonomie* will in principle be obtained and functioning. Furthermore, since works constitution might impede the freedom of coalition it can only be compatible with Art 9 III GG when freedom of coalition is guaranteed within the works constitution. Art 9 III GG therefore provides for union activity in the works constitution (BVerfG, cit. opp.).

²⁵⁶ Walter Arendt, *Die Reform der Betriebsverfassung*, in: *Bundesarbeitsblatt* 1972, p. 273ff. (p. 274).

However, those 25,000 plants employed about two-thirds of all employees (Arendt, cit. opp., p. 274).

had proved its worth, encouraging a trustful co-operation between employers and employees²⁵⁷.

Reactions and Criticism by Unions

Unionists declared that “the law stands quasi as a barrier between the plant and the union”. IG Metall considered the *BetrVG* “a open challenge by German employers and their political allies against the unions” and a DGB publication stated that

“all reports that the Works Constitution Act is a compromise between the position of the employers and the unions are false. This law has to be changed because it is clearly against workers”²⁵⁸.

The DGB criticised the law inter alia because it did not include public services, implied a separation between councils and unions and provided only for unsatisfactory union rights in the plant, providing no direct access to the shop-floor. The obligation to co-operate trustfully with the employer, the fact that councils were not allowed to strike and had to maintain silence on matters that might harm their employers (but benefit unions in collective bargaining) and the virtual restriction of co-determination to social issues, especially the lack of rights of councils in terms of dismissals were criticised too²⁵⁹. The DAG

²⁵⁷ Hanns Martin Schleyer, *Zehn Jahre Betriebsverfassungsgesetz*, in: *Schriftenreihe Der Betrieb*, Beiträge zum Betriebsverfassungsgesetz – 10 Jahre Betriebsverfassungsgesetz, Düsseldorf 1962, p. 9ff. (p. 16); wikipedia, Hanns-Martin Schleyer, http://de.wikipedia.org/wiki/Hanns_Martin_Schleyer, last accessed March 11th, 2006.

²⁵⁸ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 77f.

²⁵⁹ Ursula Engelen-Kefer, *25 Jahre Betriebsverfassungsgesetz und die Zukunft der betrieblichen Mitbestimmung*, in: *Mitbestimmung und Beteiligung : Modernisierungsbremse oder Innovationsressource?*, Forschungsinstitut der Friedrich-

criticised the *BetrVG*'s failure to offer any participation rights to individual employees²⁶⁰.

Unions regarded the *BetrVG* as a defeat and initially responded by trying to enhance union presence at plant level mainly in two ways: they made an effort in fostering *Vertrauensleute*²⁶¹ committees as a counterpoint to (and check on) councils and advocated in the plants in order to fill councils with union members²⁶². Both initiatives were successful (the percentage of union members on councils has constantly been above 75% since 1957) and also eventually helped to stop the negative trend in membership²⁶³, while initially, the law led to a fall in union density from 56.2% in 1952 to 37.7% in 1963²⁶⁴.

Relationship between Unions and Works Councils

The development of centralised bargaining after the war (see Chapter I) necessarily led to agreements that didn't push the envelope for many employers, At the same time the economically very favourable conditions of the late 1950s

Ebert-Stiftung, Abt. Arbeits- und Sozialforschung, Bonn 1998, <http://www.fes.de/fulltext/asfo/00226006.htm>, last accessed March 3rd, 2006; Andrei S. Markovits, *The Politics of the West German Trade Unions – Strategies of Class and Interest Representation in Growth and Crisis*, Cambridge 1986, p. 119.

²⁶⁰ Herbert Anders, *Das neue Betriebsverfassungsgesetz aus der Sicht der DAG*, in: *Bundesarbeitsblatt* 1972, p. 299ff. (p. 299f.).

²⁶¹ Union workplace representatives. These are to be distinguished from British shop stewards in that they have no right to bargain or any other participative functions. Their task is to provide a link between the union and the members in the workplace.

²⁶² Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 78f.

²⁶³ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 79f; DGB, *Betriebsrat ist besser*, <http://www.betriebsrat-ist-besser.dgb.de/betriebsrat>, last accessed May 1st, 2006.

²⁶⁴ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 77f.

resulted in greater shop floor power and a system of informal “seconds rounds” of wage bargaining, conducted by works councils on shop floor level, developed. Even though this practice was technically illegal (§ 77 III and § 87 I *BetrVG* bar councils from negotiating on matters usually determined by collective agreements), councils in the metal industry succeeded in negotiating wage additions of on average 22.5%. These additions became an important part of workers' earnings and thus gave the councils noticeable, albeit unofficial, power²⁶⁵. Unions welcomed this development since it helped contain opposition towards the central bargaining system, which became more vocal in the late 1960s and their perception of councils changed²⁶⁶. In the 1970s, unions started to foster councils by weakening the status of their own *Vetrauensleute*²⁶⁷ and making them more ancillary to the councils²⁶⁸.

Thus Unions, having secured shopfloor presence through union members in works councils, obviously had made their peace with centralised bargaining, the

²⁶⁵ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 82f.

²⁶⁶ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 85f.

The wildcat strikes in 1969 were calls for decentralised bargaining, more power and autonomy within the *Betrieb* (see Chapter I, for a definition of *Betrieb* see footnote 228), caused by the unions' insistence on centralised bargaining and wage restraints after the recession of 1966/67. At the same time, works councils were powerless to deter employers from refusing to negotiate the informal „second round“, which added to the discontent of the workers. However, unions managed to deflect demands for more shop-floor influence within the union into discussions about extended rights for the works councils. This came to be reflected in the *BetrVG* 1972 that gave councils more rights against management (Thelen, cit. opp, p. 85f.).

²⁶⁷ Union workplace representatives. These are to be distinguished from British shop stewards in that they have no right to bargain or any other participative functions. Their task is to provide a link between the union and the members in the workplace.

²⁶⁸ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 99.

dual system of representation and their role as a representative outside the plant. They tried to keep down opposition to the councils that were severely restricted in their bargaining rights by law and posed no threat to the unions' array²⁶⁹.

BetrVG 1972

Reasons for the Amendment

Work environments and social conditions changed dramatically during the 1960s and 1970s and the *BetrVG* thus needed updating. Technical innovations like computerisation had an influence on jobs and the governing Social Democrats, having opposed the BetrVG 1952, felt that workers should have the possibility to act instead of merely react²⁷⁰.

The Process of Amendment

When discussions over an amendment of the *BetrVG* started, the DGB strived

²⁶⁹ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 82f., 93.

Mathöfer, “head of the IG Metall’s education department and SPD member of parliament”, put it that at the turn of the decade unions “had learned to live with works councils, and recognized that they were a stabilising force, not a threat” (Thelen, cit. opp, p. 93,96).

²⁷⁰ Walter Arendt, *Betriebsrätewahlen 1972 nach besserem Recht - Betriebsverfassungsgesetz: Ein gutes Stück innerer Reform*, in: Sozialdemokratischer Pressedienst, P/XXV/236, December 14th, 1970, p.1ff. (p. 1); Fred Zander, *Betriebsverfassung im Meinungsstreit – Am Regierungsentwurf scheiden sich die Geister*, in: Sozialdemokratischer Pressedienst, P/XXVI/39, Februar 26th, 1971, p. 3ff. (p. 4).
Walter Arendt was then Federal Minister for Labour and Social Affairs in the Social Democrats-Liberal coalition under Brandt.
Due to the dual system, union had little influence on how these changes were implemented at plant level.

for a closer co-operation between councils and unions and for the right of council members to be active for their union in the plant²⁷¹. Eventually, the *BetrVG 1972* was passed and came into force on January 19th, 1972²⁷². Being a fundamental reorganisation it was designated as a profound turning point in the history of works constitution²⁷³.

Changes and Innovations

A number of regulations the unions had opposed in the *BetrVG 1952* were kept: the duty to peaceful cooperation with the employer and the prohibition for councils to take industrial action for matters of the works constitution²⁷⁴. Unions' rights were strengthened (see below), while the general division between works councils *in* the plant and unions *outside of* the plant was upheld. Although more

²⁷¹ Vorschläge des DGB zur Änderung des Betriebsverfassungsgesetzes (I), in: Arbeit und Recht 1969, p. 80f. (p. 80f.); Wolfgang Schneider, Das neue Betriebsverfassungsgesetz aus der Sicht des DGB, in: Bundesarbeitsblatt 1972, p. 292ff. (p. 292f.); Fritz Auffarth, Das neue Betriebsverfassungsgesetz, in: Arbeit und Recht 1972, p. 33ff. (p. 33).

This has to be seen in connection with the demand of the shop floor to have more power within the unions that has been detailed in Chapter I.

²⁷² Friedhelm Farthmann, Grundzüge der neuen Betriebsverfassung, in: Gewerkschaftliche Monatshefte 1972, p. 4ff. (p. 5f.); Walter Arendt, Die Reform der Betriebsverfassung, in: Bundesarbeitsblatt 1972, p. 273ff. (p. 273).

²⁷³ Jobst-Hubertus Bauer, 25 Jahre Betriebsverfassungsgesetz, in: Neue Zeitschrift für Arbeitsrecht 1997, p. 233ff. (p. 234).

²⁷⁴ This of course meant that the institution of *Einigungsstelle*, an arbitration board, was furthermore needed. This institution was already present in the 1952 law. There are basically two ways to solve industrial conflicts, by industrial action or arbitration. Since industrial action is prohibited for the sake of *Betriebsfrieden*, an arbitration board was necessary to ensure participation, for otherwise the employer (without the fear of industrial action) would retain the sole power to decide. (Fritz Auffarth, Das neue Betriebsverfassungsgesetz, in: Arbeit und Recht 1972, p. 33ff. (p. 40)).

than 75% of councillors are union members, works councils continued to be independent representation bodies obliged to represent the interests of the whole workforce, regardless of union membership²⁷⁵.

Works Council Rights

Participation rights of councils were extended to merit pay and the right to object in personnel matters expanded (§99). A hearing right in dismissals was introduced (§102), and matters like hiring, relocating, pay scale grouping and change of pay group were made subject to approval by the councils in plants with more than 20 elective employees²⁷⁶.

Under the 1952 law participation rights had only been given for individual personnel matters immediately pending; now, councils were given a right to participate in personnel planning as well (§ 92). Furthermore, employers now had a duty to not only inform but also consult the council on proposed changes in jobs or production systems or introduction of new technology (§ 90)²⁷⁷. Full co-determination rights were given in § 87

“on issues such as working time arrangements in the plant, short-time work,

²⁷⁵ Fritz Auffarth, Das neue Betriebsverfassungsgesetz, *in*: Arbeit und Recht 1972, p. 33ff. (p. 34, 35); Walter Arendt, Die Reform der Betriebsverfassung, *in*: Bundesarbeitsblatt 1972, p. 273ff. (p. 274).

²⁷⁶ Fritz Auffarth, Das neue Betriebsverfassungsgesetz, *in*: Arbeit und Recht 1972, p. 33ff. (p. 38).

²⁷⁷ Kathleen A. Thelen, Union of Parts – Labor Politics in Postwar Germany London 1991, p. 100f; Friedhelm Farthmann, Grundzüge der neuen Betriebsverfassung, *in*: Gewerkschaftliche Monatshefte 1972, p. 4ff. (p. 8); Wolfgang Schneider, Das neue Betriebsverfassungsgesetz aus der Sicht des DGB, *in*: Bundesarbeitsblatt 1972, p. 292ff. (p. 295); Fritz Auffarth, Das neue Betriebsverfassungsgesetz, *in*: Arbeit und Recht 1972, p. 33ff. (p. 38).

overtime, work breaks, the establishment of vacation times, plant wage systems and the setting of piece rates”.

Consultation rights were introduced to issues of work organisation²⁷⁸. An important introduction was the possibility, under certain circumstances the obligation, to access conciliation and arbitration procedures when council and employer didn't succeed in concluding an agreement. Works councils are not allowed to take industrial action, the obligation to go through arbitration thus gives their demands more force – if no agreement was reached the employer can not just reassume the old status quo. While each party has an interest to avoid arbitration (after all, the board can decide either way), the employer has an added incentive in that he has to pay for it²⁷⁹.

Important in economic crises, § 111ff. require information and consultation of the works council in the event of ‘major changes’ in the plant. Employers and councils have the possibility to conclude an *Interessenausgleich* and/or a (enforceable) *Sozialplan*²⁸⁰, while the dual system with centralised bargaining meant that unions generally had little or no influence on those matters.

Works councillors and candidates were better protected against dismissal: while

²⁷⁸ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany* London 1991, p. 100f.

²⁷⁹ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 101.

²⁸⁰ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 101.

Interessenausgleich may be translated as “reconciliation of interests”, while a *Sozialplan* is a social compensation plan, designed to alleviate the economic disadvantages employees may suffer due to the changes.

If employer and works council do not succeed in concluding an *Interessenausgleich*, they can appeal to either the head of the Federal Employment Office for arbitration (§ 112 II 1 BetrVG) or to the normal arbitration board. A *Sozialplan* can be enforced by appealing to the arbitration board (§ 112 IV BetrVG). This shows the importance negotiations between councils and employers are given.

under the 1952 law only contractual notices of dismissal were prohibited, now also extraordinary notices of dismissal were complicated by making the agreement of the works council obligatory (§ 103)²⁸¹.

Union Rights

Unions' right to access the plant was extended and qualified, according to § 2 II *BetrVG* union delegates (not necessarily full time officials) now had the right to enter a plant in relation to their duties and responsibilities under the new law; something that had been problematic under the old law. They were given the right to submit their own lists with candidates for councils elections and to call a plant assembly to create an election committee (however, these rights were only applicable in plants without an existing council); if no committee was forthcoming they could appeal to the labour court for establishing one. Unions could now, under certain circumstances, demand that the council call a plant assembly and they were to be informed of time and topics of any other plant assemblies. Councillors were given the right to “perform functions and activities in the plant on behalf of the union”, however, the principle of neutrality in § 75 meant that discrimination on grounds of union-membership was (and is) not allowed, so works councils are obliged to treat members and non-members

²⁸¹ Fritz Auffarth, Das neue Betriebsverfassungsgesetz, *in*: Arbeit und Recht 1972, p. 33ff. (p. 36).

This was connected with an amendment in §§ 15, 16 KSchG, which prolongs the prohibition of contractual dismissal for half a year after tenure. This intends to provide the ex-councillor with a period of time to catch up with “ordinary” work life and a period in which eventual disagreement with the employer that might have come up during his term of office can cool down. §§ 15, 16 KSchG furthermore extended that protection of contractual dismissal to candidates for election and members of the election committee (Auffarth, cit. opp. p. 36).

alike²⁸². This reveals a fundamental difference between unions and works councils: while works councils are obliged to represent all workers in the plant, unions have the right to only care for their members.

Councillors were allowed “to participate in union seminars at the company's expense and on paid leave” - innovations that clearly strengthened the tie between unions and councils²⁸³, giving unions stronger standing in the plant.

²⁸² Heinz Gester, Zur Stellung der Gewerkschaften im Betrieb nach dem neuen Betriebsverfassungsgesetz, *in*: Gewerkschaftliche Monatshefte 1972, p. 19ff. (p. 21); Walter Arendt, Die Reform der Betriebsverfassung, *in*: Bundesarbeitsblatt 1972, p. 273ff. (p. 275); Wolfgang Schneider, Das neue Betriebsverfassungsgesetz aus der Sicht des DGB, *in*: Bundesarbeitsblatt 1972, p. 292ff. (p. 297); Fritz Auffarth, Das neue Betriebsverfassungsgesetz, *in*: Arbeit und Recht 1972, p. 33ff. (p. 35).

The right to enter is not restricted to visits the works council but gives the right to visit employees as well. There is no need to obtain the approval of the employer, he does need to be informed beforehand, though (and might deny access under certain, narrowly defined circumstances)

Before the amendment the right to be active for a union while being a works councillor was sometimes disputed by literature and judicature. The *BAG* as well as the *BVerfG* and the *BVerwG* had sometimes decided that works council members were not allowed to recruit for their union; this could not be upheld under the new provisions (Auffarth, *opp. cit.* p. 35).

²⁸³ Kathleen A. Thelen, Union of Parts – Labor Politics in Postwar Germany, London 1991, p. 102; Heinz Gester, Zur Stellung der Gewerkschaften im Betrieb nach dem neuen Betriebsverfassungsgesetz, *in*: Gewerkschaftliche Monatshefte 1972, p. 19ff. (p. 21); Walter Arendt, Die Reform der Betriebsverfassung, *in*: Bundesarbeitsblatt 1972, p. 273ff. (p. 275); Wolfgang Schneider, Das neue Betriebsverfassungsgesetz aus der Sicht des DGB, *in*: Bundesarbeitsblatt 1972, p. 292ff. (p. 297); Fritz Auffarth, Das neue Betriebsverfassungsgesetz, *in*: Arbeit und Recht 1972, p. 33ff. (p. 34); Herbert Anders, Das neue Betriebsverfassungsrecht aus der Sicht der DAG, *in*: Bundesarbeitsblatt 1972, p. 299ff. (p. 303); Reinhard Richardi (Ed.), Betriebsverfassungsgesetz mit Wahlordnung – Kommentar, 10th Edition, München 2006, Einleitung Rz 24.

The right to obtain access to the plant according to § 2 II BetrVG was given to any representative of a union, not necessarily an official, as far as necessary to fulfil the rights and obligations given to them under the statute. It included the right to visit the whole plant and individual employees, not only the works council. There is no need to obtain consent of the employer, however, he has to be informed and may object under special circumstances (Auffarth, *opp. cit.* p. 34).

Furthermore, an obligation for works councils to co-operate with unions represented on the shopfloor in matters specified by the law and “to the best of employees and enterprise” was introduced²⁸⁴.

Apart from these more “internal” rights, unions were given the power to take legal action against a councillor, a works council or an employer violating their obligations under the *BetrVG*. At the same time, they were given the power to lodge a complaint against anyone who committed an offence laid down in § 119 BetrVG against works constitution organs or their members²⁸⁵.

Assessment by Unions and Employers

Despite some criticism regarding the continuing division between unions and councils, peace obligation and duty to cooperate with the employer, the DGB regarded the new *BetrVG* as far more progressive than its predecessor²⁸⁶.

The DAG welcomed a number of amendments giving the councils new or extended participation rights and acknowledged that it brought essential improvements in terms of co-determination in personnel matters, even though the DAG's demands to make all personnel matters depending on agreement by the works council were not met²⁸⁷.

Unions suggested that the law should be amended so as to enable unions to take over responsibilities of works councils where none existed. The general

²⁸⁴ Herbert Anders, Das neue Betriebsverfassungsrecht aus der Sicht der DAG, *in*: Bundesarbeitsblatt 1972, p. 299ff. (p. 303).

²⁸⁵ Herbert Anders, Das neue Betriebsverfassungsrecht aus der Sicht der DAG, *in*: Bundesarbeitsblatt 1972, p. 299ff. (p. 303); Fritz Auffarth, Das neue Betriebsverfassungsgesetz, *in*: Arbeit und Recht 1972, p. 33ff. (p. 34).

²⁸⁶ Wolfgang Schneider, Das neue Betriebsverfassungsgesetz aus der Sicht des DGB, *in*: Bundesarbeitsblatt 1972, p. 292ff. (p. 295).

²⁸⁷ Herbert Anders, Das neue Betriebsverfassungsgesetz aus der Sicht der DAG, *in*: Bundesarbeitsblatt 1972, p. 299ff. (p. 302).

assessment was that the *BetrVG 1972*, while being a definite step forward, needed to be further developed to provide for a participation of employees on an equal footing with the employer²⁸⁸.

Employers' side held that entrepreneurial decision-making and planning power were threatened, especially by participation rights in personnel matters; the new law would place too great demands particularly on small enterprises, since it provided for a multitude of institutions and processes, slowing down decisions of the entrepreneur and the works council²⁸⁹. However, hope was expressed that meaningful co-operation would still be possible, founding this hope on the experiences with the *BetrVG 1952*²⁹⁰.

Despite those criticisms the number of works councils went up from about 25,000 in 1968 to about 36,000 in 1981²⁹¹.

Impact on the Relationship between Unions and Works Councils

The relationship between unions and councils changed after the reform of 1972,

²⁸⁸ Wolfgang Schneider, 5 Jahre Betriebsverfassungsgesetz 1972 – eine Zwischenbilanz, *in*: Das Mitbestimmungsgespräch 1977, p. 23ff. (p. 29, 30); Wolfgang Schneider, Das neue Betriebsverfassungsgesetz aus der Sicht des DGB, *in*: Bundesarbeitsblatt 1972, p. 292ff. (p. 299); Herbert Anders, Das neue Betriebsverfassungsgesetz aus der Sicht der DAG, *in*: Bundesarbeitsblatt 1972, p. 299ff. (p. 304).

²⁸⁹ Alfred Wisskirchen, Das neue Betriebsverfassungsrecht aus der Sicht der Arbeitgeber, *in*: Bundesarbeitsblatt 1972, p. 288ff. (p. 289).

²⁹⁰ Alfred Wisskirchen, Das neue Betriebsverfassungsrecht aus der Sicht der Arbeitgeber, *in*: Bundesarbeitsblatt 1972, p. 288ff. (p. 292).

²⁹¹ Fritz Auffarth, Zehn Jahre Betriebsverfassungsgesetz 1972, *in*: Recht der Arbeit 1982, p. 201ff. (p. 201, 204). An explanation offered by the vice-president of the BAG held the protection of dismissal for members of election committees and candidates for election at least partly responsible. In his assessment, the *BetrVG* had so far (1982) stood the test in difficult times (Auffarth, cit. opp. p. 204).

both due to the new law and to economical developments.

§ 2 I *BetrVG* stipulates that works councils and unions represented in the plant are obliged to co-operate, taking into account the applicable collective agreements. Consequently, the participation rights on issues laid down in § 87 I are only applicable if those topics have not been regulated by law or collective agreement. While works councils and employers are allowed to conduct *Betriebsvereinbarungen*, that is, agreements between employers and works council on plant level, wages and conditions that either are or *typically* are determined by collective agreements are not allowed to be regulated by those (§77 III). This of course gives unions (or rather, the social partners) scope to determine the responsibilities of the councils, while councils are not able to constrict the constitutional guaranteed rights of unions in the plant. At the same time, it upholds the attractiveness of unions since the permission to adopt terms of a collective agreement in a *Betriebsvereinbarung* would extend the scope of the collective agreement from union members to everyone in the plant. Unions therefore are in a primary position²⁹².

The impact of the reform on the relationship between unions and works councils cannot be fully understood without reference to the economic background of the 1970s. While employers faced increasing competition in the aftermath of the oil-crisis of 1973, technological innovations and their potential for rationalisation became more affordable. At the same time, international economics underwent a structural change as industrialisation took hold in former 'underdeveloped'

²⁹² Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition, Baden-Baden 2000, p.64f; Fritz Auffarth, *Das neue Betriebsverfassungsgesetz*, in: *Arbeit und Recht* 1972, p. 33ff. (p. 34).

Of course, the perception of councils as unions' agents might bear the danger of weakening the unions' position when employees are of the opinion that they are well cared for by the council (fulfilling unions' function) and regard membership therefore as not necessary.

countries, making them competitors in more traditional industries (steel, textiles, ship building) traditionally by 'advanced' countries. Additionally, Japanese manufacturing entered the market on a big scale²⁹³. This had a profound impact for unions (see Chapter I) who so far had acted under very favourable conditions with virtually no unemployment and secure economic growth. Now rising unemployment led to decreasing bargaining power and industrial relations at national level became less and less cooperative. Technological change and its perception as a “job killer” gradually became, along with the struggle against unemployment, a main focus of unions. In this situation, works councils were able to deal with conflicts arising at plant level by making use of their more numerous and stronger information and consultation rights in terms of introduction of new technology. Due to the fact that most councillors are union members, councils became the main actors for unions in their relationship with employers specifically on the issue of technology. This co-operation on the other hand gave councils greater influence in the dual system²⁹⁴. A survey undertaken by Thelen in 1985 supports the notion that works councils and unions are interdependent. She found that

“in general, a strong union presence is associated with a more aggressive use of works council rights across a broader range of issues. Stronger legal rights under *Montanmitbestimmung* and the greater political power associated with higher unionization are sources of strength for labor in its

²⁹³ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 108.

²⁹⁴ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 109, 113, 186.

Hans Mayr, head of collective bargaining for the IG Metall in 1977 called for “an economic policy that gives first priority to full employment ... [and] coordinated regional and sectoral policies that give priority to the creation of stable jobs“ (Thelen, cit. opp. p. 113).

dealings with employers. Where union presence is low as in depoliticized legalism, works councils are neither as likely to challenge management, nor are they as successful in doing so as in plants where union presence is higher.²⁹⁵

Their legally backed status and their legal rights made works councils an important factor in maintaining workers' influence and collective rights in times when national (centralised) bargaining power decreased. Simultaneously, the division between unions at national level and councils at plant level helped to maintain (relative) industrial peace – while national negotiations grew increasingly tense and hostile, negotiations and participation at plant level were still characterised by the search for peaceful ways to adjustments²⁹⁶.

The shift in the 1980s from wage bargaining towards 'quality bargaining' (Chapter I) also had implications on the relationship between unions and councils, since, as Thelen points out

“central negotiations over working-time reduction, ... , produced no universally binding regulations, but instead defined the parameters for a second round of negotiations at the plant level. Opening clauses in the central agreements delegated important responsibilities to plant works councils, which are not to simply administer the central agreements, but to actively shape their implementation in the plant.”²⁹⁷

Besides strengthening of the position of works councils, those agreements (the

²⁹⁵ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 128.

²⁹⁶ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 121.

²⁹⁷ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 156.

difference to the unofficial second rounds of wage bargaining of the past being that this time plant negotiations were ‘legal’) led also to a strengthening of co-operation with the unions. When the 1984 agreement of IG Metall on working time left the details to the councils, the union advised them to not proceed before instructed and dealt out information, including model agreements²⁹⁸. It held that the works councils should try to negotiate a general working week of 38.5 and should resist employers’ attempts to introduce different working times for different classes of employees. In the end, the campaign was successful, and only 5.7% of employees in the metalworking industry had a regular working time different from 38.5 hours²⁹⁹. This demonstrates the close relationship between unions and councils and the unions’ influence on councils and plant negotiations, which they tried to enhance by providing training and services to councillors.

Later Amendments to the BetrVG 1972

1988

Important amendments to the BetrVG were made in 1988³⁰⁰. Tenure was extended from 3 to 4 years, employers’ duty to inform when introducing new

²⁹⁸ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 166.

²⁹⁹ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 166f.

(even though this might have been partly due to indifference on the employers’ side, Thelen, cit. opp. p. 167)

³⁰⁰ Gesetz zur Änderung des Betriebsverfassungsgesetzes, über Sprecherausschüsse der leitenden Angestellten und zur Sicherung der Montanmitbestimmung vom 20. 12. 1988 (Bundesgesetzblatt I 2312).

technologies were specified, and the definition of *leitender Angestellter*³⁰¹ (excluded from most of the rights under the *BetrVG* due to his proximity to management) new phrased. Unions criticised the fortified protection of minorities in council elections and activities, arguing that ‘protection of minorities’ was only a disguise to complicate unified representation of interest within the works constitution³⁰².

2001

Major amendments were made under the Social Democrat/Green coalition in 2001³⁰³. They concerned mainly organisational matters: a new mode of election for small enterprises was introduced and the differentiation between *Arbeiter* and *Angestellte*³⁰⁴ abolished³⁰⁵. While this complied with union demands to dispose of the *Gruppenprinzip*³⁰⁶, enhanced necessity to include the minority sex in the council was introduced. Furthermore, the *Übergangsmandat* and the *Restmandat*³⁰⁷, providing for continuing representation after mergers or

³⁰¹ Executive employee.

³⁰² Michael Kittner, Betriebsverfassungsgesetz – Einleitung, in: Michael Kittner, Arbeits- und Sozialordnung – Ausgewählte und eingeleitete Gesetzestexte, 29th Edition, Frankfurt am Main 2004, p.463ff. (p. 466).

³⁰³ Betriebsverfassungs-Reformgesetz vom 23. 7. 2001 (Bundesgesetzblatt I 1852).

³⁰⁴ *Arbeiter* and *Angestellte* might be compared to blue- and white-collar workers. They have for a long been treated differently under German law, e.g. in respect to notices of dismissals.

³⁰⁵ This coincided with the dissolution of the salaried employees' union DAF in the public service union ver.di in 2001.

³⁰⁶ Group-principle. Under this principle, blue- and white-collar workers did elect their representatives to the works council separately.

³⁰⁷ An *Übergangsmandat* results when a *Betrieb* (see footnote 22) is split up. The former works council will then remain, under certain circumstances laid down in § 21a BetrVG, in office until a new council is elected.

A *Restmandat* emerges when a *Betrieb*, due to closedown, demerger or merger ceases to exist. The works council will then remain in office as long as it is necessary to exercise the participation and codetermination rights in regards to the breakup (§ 21b BetrVG).

demergers, was explicitly laid down and social partners were given extended rights to determine the *betriebliche Einheit*³⁰⁸ in § 3³⁰⁹.

The possibilities to extend councils' powers by collective agreement were expanded and in plants where no collective agreement is applicable, expansions can be undertaken via *Betriebsvereinbarung*³¹⁰ (§ 3 II). Additionally, § 3 I No. 4 now explicitly allows for additional inter-company works council structures to be set up by collective agreement³¹¹. This might have an impact on unions since industrial relations above the single plant or enterprise had always been their array; but the creation of such organs can only be done by collective agreement and is therefore in unions' hands³¹².

Participation rights, however, were extended only marginally: the method of

³⁰⁸ Company entity.

³⁰⁹ Michael Kittner, Betriebsverfassungsgesetz – Einleitung, *in*: Michael Kittner, Arbeits- und Sozialordnung – Ausgewählte und eingeleitete Gesetzestexte, 29th Edition, Frankfurt am Main 2004, p.463ff. (p. 467f); Peter Hanau, Die Reform der Betriebsverfassung, *in*: Neue Juristische Wochenschrift 2001, p. 2513ff. (p. 2514ff., 2519).

However, the regulations regarding the representation of both sexes require merely that the sex in the minority be represented in the council; this may lead to the majority sex not being represented at all.

(Manfred Löwisch, Arbeitsrecht, 7th Edition, Düsseldorf 2004, p, 130, Rn. 445).

³¹⁰ An agreement on company level between employer and works council and subject to § 77 BetrVG.

³¹¹ Peter Hanau, Die Reform der Betriebsverfassung, *in*: Neue Juristische Wochenschrift 2001, p. 2513ff. (p. 2513).

The possibility to elect a *Gesamtbetriebsrat*, that is, a works council operating on corporation level in a corporation containing more than one *Betrieb*, in addition to the 'normal' works councils at *Betriebslevel*, had been introduced earlier.

³¹² The DBG generally welcomed the more flexible regulations, but emphasised that those only were to be undertaken by collective agreement, not *Betriebsvereinbarung* – otherwise the *Tarifautonomie* might be endangered (Bundesvorstand des DGB, Der Referentenentwurf eines Gesetzes zur Reform des Betriebsverfassungsgesetzes, *in*: Neue Zeitschrift für Arbeitsrecht 2001, p. 135ff. (p. 135).

determining the minimum number of employees had been changed³¹³, therefore, co-determination rights in personnel matters might now also be applicable in small plants when there are at least 20 employees in the company. In conjunction with that, the threshold number for a council right to demand the passing of guidelines for choosing which employees shall be subject to personnel matters was lowered from 1000 to 500 employees in the plant³¹⁴.

The amendment upheld the division between unions on the outside, works councils on the inside. The new possibility to elect inter-company councils might prove a dilution of this concept, but it has to be awaited how extensively this will be used – after all, the possibility can only be set up by collective agreement.

Changes due to European Influences

Changes to the Works Constitution Act or the dual system due to European legislation have been marginal and mostly regarded technicalities, while the principal system of a statutory representation body with strong legal right, independent from unions, has been left untouched.

The Directive on Mass Redundancies, for example, enhanced the position of the works council by equipping it with more extensive information and consultation

³¹³ *Betrieb* has been defined in footnote 22. An *Unternehmen* is defined as “a organisational entity, defined by its economical or ideational intention, to which intention are serving one or several organisationally linked *Betriebe* of the same *Unternehmen*”.

(Günter Schaub (Ed.), *Arbeitsrechts-Handbuch, Systematische Darstellung und Nachschlagewerk für die Praxis*, 11th Edition, München 2005, p. 125, § 18, Rn. 10.)

³¹⁴ Michael Kittner, *Betriebsverfassungsgesetz – Einleitung*, in: Michael Kittner, *Arbeits- und Sozialordnung – Ausgewählte und eingeleitete Gesetzestexte*, 29th Edition, Frankfurt am Main 2004, p.463ff. (p. 467f); Peter Hanau, *Die Reform der Betriebsverfassung*, in: *Neue Juristische Wochenschrift* 2001, p. 2513ff. (p. 2518).

rights³¹⁵. Likewise, the Directive on Information and Consultation was hardly noticed in the German public. No special implementation measures were undertaken since it was believed that the *BetrVG* was sufficient³¹⁶.

Conclusion

Works councils helped develop the centralised system of collective bargaining.

³¹⁵ The decision in *Junk v Kühnel* (C-188/03) led to a further strengthening of the works council in relation to the employer. It was decided that, for the purposes of the Directive on Mass Redundancies, the term ‘dismissal’ (*Entlassung*) is to be understood as ‘declaration of dismissal’ (*Kündigung*) by the employer. This had implication for German practice since before that decision it was widely assumed (and in fact permanent jurisdiction of the BAG) that it was sufficient to conclude consultation after the dismissals had been declared but before they became effective. The ECJ explained that the aim of consultation had to be to possibly prevent dismissal and of course, therefore consultation had to be completed before the dismissals are declared. After all, the aim of the Directive and decisive for its interpretation is the protection of employees, combined with the principle of adaptation of working conditions by way of progress as laid down in Art. 11 EC Treaty. This of course enhances the possibilities of the works council to actually propose measures that might render a few dismissals unnecessary. (Helga Appel, Die “Junk”-Entscheidung des EuGH zur Massenentlassung – Nur eine Aufforderung an den Gesetzgeber?, in: *Der Betrieb* 2005, p. 1002ff. (p. 1002); Hellmut Wissmann, Probleme bei der Umsetzung der EG-Richtlinie ueber Massenentlassungen in deutsches Recht, in: *Recht der Arbeit* 1998, p. 221ff. (p. 223).

³¹⁶ While the *BetrVG* in fact is broadly in compliance with the Directive, a few problems remain. For example, the *BetrVG* doesn't make the election of a works council mandatory; rather, employees have the possibility and the right to elect one. A “common declaration” of European Parliament, European Council and Commission on this issue merely refers to the decision of the ECJ in *Commission v United Kingdom* of June 1994. This states clearly the implications of the principle of subsidiarity: on the one hand the Directive of Information and Consultation is intended to lead to a community-wide social dialogue in enterprises, on the other hand the laws and practices of the individual member states rate high in the process of implementation. The ECJ thus demands an *Untermaßverbot* (prohibition to fall short of the protection provided for in the Directive): the social dialogue at the workplace must not be at will of the employer, rather the implementations of the member states have to ensure the effectiveness of the Directive. The *BetrVG* thus is regarded as sufficient, since it provides for a standing representation body independent from the good-will of the employer (§§ 14 – 17a *BetrVG*). However, it needs to be ensured that information and consultation will take place where there is no standing body of representation. (Additionally it was held that the Directive was based on Art 137 II 2 in connection with Art 137 I

Unions had the chance to (and, due to the fact that the *BetrVG 1952* virtually banned them from the plant, were forced to) concentrate on negotiations at national or district level while councils undertook the day to day representation on plant level. However, even though the two systems are technically divided, unions managed to exert influence on councils by filling them with union members and offering services to councillors. Rights of unions' within the works constitution have been strengthened under the *BetrVG 1972*, giving them greater options to exert their influence. The existence of councils therefore might not only have attributed to the unions role as a central negotiator but also to their role as service provider for members – where there is no strong union presence

lit.e of the European Treaty, which only allows for the passing of Directives on Information and Consultation and not on Art 137 III of the Treaty that allows for the passing of regulations on representation and collective attending to interests, and therefore implies no duty to provide representation bodies.)

The DGB noted that the rights of the works council regarding information and consultation are to be extended with respect to decisions that might bring about material alterations of works organisation or employment contracts. For example, information regarding decisions resulting in *Änderungskündigung* (dismissal with the option of altered conditions of employment) or transfer of employees will have to be undertaken earlier than under §§ 99, 102 BetrVG; apart from that, the DGB states that the administration fine in § 121 BetrVG does not constitute a adequate sanction of offences against the directive; the *Nachteilsausgleich* (making good the financial prejudice sustained by an employee through his employer's failure to effect an *Interessenausgleich* in connection with *Betriebsänderungen*) in § 113 BetrVG for offences against §§ 111ff. BetrVG, however, might provide such an adequate sanction. The *Personalvertretungsgesetz* (works councils for the public service) will have to be supplemented by such a provision (and by information and consultation rights like those in § 111 BetrVG) in order to comply with the Directive.

(Hermann Reichold, Durchbruch zu einer europäischen Betriebsverfassung – Die Rahmenrichtlinie 2002/14/EG zur Unterrichtung und Anhörung der Arbeitnehmer, *in*: Neue Zeitschrift für Arbeitsrecht 2003, p. 289ff. (p. 294f.); DGB, Analyse zu den Auswirkungen der Verabschiedung der Richtlinie 2002/14/EG des Europäischen Parlaments und des Rates vom 11. März 2002 zur Festlegung eines allgemeinen Rahmens für die Unterrichtung und Anhörung der Arbeitnehmer in der Europäischen Gemeinschaft auf das Betriebs- und Personalvertretungsrecht, *in*: einblick, Vol. 20 2002, 11. 12. 2002, <http://www.einblick.dgb.de/archiv/0220/tx022001.htm>, last accessed December 26th, 2005; Europäische Gemeinschaft, Arbeitsdokument für die Sitzung des Vermittlungsausschusses am 17. 12. 2001, C 5-0687/2001 (1998/0315 (COD) Anhang).

on the shop-floor and representation in important issues like dismissals is primarily undertaken by councils, unions needed to find other ways to be attractive to members.

It has been asserted that one reason for the development of the dual system is to be found in a desire on employers' side to avert a unified interplant representation of workers' interests – and there is indeed danger that due to its plant-centred position a council might concentrate on achieving merely better conditions for their constituents (*Betriebsegoismus*³¹⁷) while neglecting broader aims. Although possibilities of *Betriebsegoismus* are restricted under a system of centralised bargaining that gives councils, as shown above, only limited rights in classic areas of collective bargaining, the increasing use of *Öffnungsklauseln* in collective agreements, allowing for an impairment of collectively agreed terms on plant level via an agreement between works council and employer, gives greater scope for *Betriebsegoismus*. Yet, councils rely on unions in a number of ways and this might well help to keep those tendencies in check³¹⁸. Still, works councils *are* plant-centred, and by law they are obliged to keep an eye on the well-being of the plant. Since managers have to get the approval of the council in important decisions they tend to take the social consequences of their decision more into account than would otherwise be the case; councils, on the other hand, have an interest in decisions that provide for long-term economic and job security. Industrial relations on plant level are therefore characterised by

³¹⁷ Literally 'plant egoism'.

³¹⁸ Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition, Baden-Baden 2000, p.65; Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 124, 151, 153.

compromise rather than conflict³¹⁹. While this might lead to *Betriebsegoismus* especially in hard times, councils are generally well integrated within the union movement, asserting union influence within the plant. It might therefore be said that the feared, or, depending on the standpoint, wished for division of workers' representation did not occur.

The dual system has advantages: the fact that councils are legal institutions with enforceable legal rights brings collective rights especially to smaller plants and sectors without a strong union tradition or presence where they would otherwise be hard to come by. However, this might also weaken unions since employees might have the impression that no union is needed besides a works council³²⁰. That said, councils are often viewed as union organs by employees and in this way the positive influence councils have on workplace issues is reflected back upon the union, thus helping to strengthen their position³²¹.

Because they are plant-centred, councils have to deal with new problems on the shop floor (new technologies etc.) much sooner than unions. They therefore can be regarded as experimenters on those matters, long before unions have found solutions to the problem. In that way, councils might help keep unions in touch with work place reality. In fact, German unions appear to have done more than most of their European counterparts on issues such as environment and new technologies³²².

³¹⁹ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 122.

³²⁰ Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition, Baden-Baden 2000, p.66.

³²¹ Kathleen A. Thelen, *Union of Parts – Labor Politics in Postwar Germany*, London 1991, p. 152f.

³²² Wolfgang Däubler, *Gewerkschaftsrechte im Betrieb – Handkommentierung*, 10th Edition,

It seems therefore that while a danger of *Betriebsegoismus* especially in hard times is present that there are union resources available to keep it in check. It thus appears that the parties concerned managed to make the best out of the dual system.

Baden-Baden 2000, p.66.

Part Two – Second channel in British industrial relations due to European Influences?

It has been shown that the industrial relations systems in the UK and Germany are fairly different. The traditional system of representation in the UK, in accordance with its voluntaristic tradition, relied on trade unions³²³; with collective bargaining and, especially, workplace bargaining undertaken by shop stewards being the main means of workers' involvement³²⁴. In contrast to most other European countries, collective bargaining in the UK was traditionally not only concerned with the 'classic' issues, for example terms and conditions (pay, holidays etc.), but widely also covered matters such as

“organization and pace of work, technological innovation and a wide range of issues relating to control over the processes of production, as well as encroaching into areas of managerial responsibility such as recruitment, work allocation and the exercise of disciplinary sanctions”;

areas that in Germany, as has been detailed above, are covered by works councils³²⁵. In the UK's traditional system of single channel, 'representation' and 'participation' are part of collective bargaining. This wide interpretation of bargaining explains the assessment of the Donovan Commission that “properly conducted collective bargaining

³²³ Michael Terry, *Employee Representation: Shop Stewards and the New Legal Framework*, in: Paul Edwards (Ed.), *Industrial Relations – Theory & Practice*, 2nd Edition, Oxford 2003, p. 257ff. (p. 257); Mark Hall, *Assessing the Information and Consultation of Employees Regulations*, in: *Industrial Law Journal*, Vol. 34, No. 2, p. 103ff. (p. 105).

³²⁴ Even though there have been phases of systems of representation that were more detached from trade unions, for example the joint consultation committees after WW II (Sid Kessler, Fred Bayliss, *Contemporary British Industrial Relations*, 3rd Edition, Houndsmill 1998, p. 124)

³²⁵ Michael Terry, *Employee Representation: Shop Stewards and the New Legal Framework*, in: Paul Edwards (Ed.), *Industrial Relations – Theory & Practice*, 2nd Edition, Oxford 2003, p. 257ff. (p. 266).

is the most effective means of giving workers the right to representation in decisions affecting their working lives”³²⁶.

The purpose of this chapter is to assess whether and to which extent significant EC legislation has led to changes in the British system, especially to the development of a “second channel” of industrial relations, independent from trade unions.

Directives regarding Workers’ Participation

Statutory information and consultation rights within the voluntaristic system, distinct from collective bargaining, have been present in the UK for a long time. The Health and Safety at Work Act 1974 obliged employers to consult with representatives of recognised trade unions on matters of Health and Safety³²⁷ and from the mid 1970s on Directives have forced employers to consult with their employees on transfer of undertakings, mass redundancies and other things³²⁸. These regulations, however,

³²⁶ Royal Commission on Trade Unions and Employers’ Associations 1965 – 1968, Report, London 1968, para 212; Howard Gospel, Paul William, Dilemmas in Worker Representation – Information, Consultation and Negotiation, *in*: Howard Gospel, Stephen Wood (Ed.), *Representing Workers – Union Recognition and Membership in Britain*, London 2003, p. 144ff. (p. 146).

³²⁷ Paul Davies, Mark Freedland, *Labour legislation and Public Policy*, Oxford 1993, p. 343f.; Paul Davis, Claire Kilpatrick, UK Worker Representation After Single Channel, *in*: *Industrial Law Journal*, Vol. 33, No.2, p. 121ff. (p. 122).

The regulations were a result of the report of the Robbens committee that recommended that “workpeople must be encouraged to participate fully in the making and monitoring of arrangements for health and safety at their place of work. There should be a general statutory obligation on employers to consult with their workpeople on measure for promoting safety and health. Guidance on methods of consultation and participation should be provided in a code of practice”

(Report of the Committee 1970-72, Chairman Lord Robens, *Health and Safety at Work*, London 1972, para 462)

Interestingly, the requirement to consult solely with recognised trade unions was introduced by the Labour Government, the Conservatives, when drafting the bill, had favoured a tripartite model (Davies et. al., *cit. opp.*, p. 344).

³²⁸ Roger Welch, Steve Williams, *The Information and Consultation Regulations – Much Ado about Nothing?*, *Cambrian Law Review*, Vol. 36, p. 29ff. (p. 32); Mark Hall, Mike Terry, *The Emerging*

mainly sustained unions' monopoly on representation³²⁹.

Directive on Transfer of Undertakings

The Council Directive 77/187/EEC³³⁰ was a reaction to a rise in merges in the EEC in the late 1960s³³¹ and a result of the Social Action Programme of 1974, adopted to ensure that social policy wasn't left behind by economic integration³³².

System of Statutory Worker Representation, *in*: Geraldine Healy, Edmund Heery, Phil Taylor (Ed.), *The Future of Worker Representation*, Houndsmills, Basingstoke 2004, p. 207ff. (p. 207); Mark Hall, *Assessing the Information and Consultation of Employees Regulation*, *in*: *Industrial Law Journal*, Vol. 34, p. 103ff; Manfred Weiss, *Arbeitnehmermitwirkung in Europa*, *in*: *Neue Zeitschrift für Arbeitsrecht* 2003, p. 177ff. (p. 178).

However, Davies and Kilpatrick argue that the realisation of the British Government of an "information and consultation function for worker representation" was only partly due to EC-influences while Government also responded to domestic policy, especially in the area of health and safety. For example, the "consultation requirements of the Health and Safety at Work Act 1974 predated the Community's efforts in this area".

(Paul Davis, Claire Kilpatrick, *UK Worker Representation after Single Channel*, *in*: *Industrial Law Journal*, Vol. 33, No.2, p. 121ff. (p. 122).

³²⁹ Paul Davis, Claire Kilpatrick, *UK Worker Representation after Single Channel*, *in*: *Industrial Law Journal*, Vol. 33, No.2, p. 121ff. (p. 122).

³³⁰ Council Directive of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employee's rights in the event of transfer of undertakings, businesses or parts of businesses.

³³¹ Bob Hepple, *Workers' Rights in Mergers and Takeovers: The EEC Proposals*, *in*: *Industrial Law Journal* Vol. 5, No.4, p. 197ff. (p. 198).

In 1970, there were 3.5 times as many as in 1962 and the rate of increase between 1966 and 1970 was twice as high as that between 1960 and 1966. Respective numbers for the UK in manufacturing, distribution and services had increased threefold between 1964 and 1968, a trend that generally continued in the 1970s.

(Bob Hepple, *cit. opp.* p. 198)

³³² One of the aims of the Social Action Programme was the protection of employee participation in changes of ownership or company control; another reason for the adoption of the Directive was "the economic liberalism of the Treaty of Rome directed against the restriction of competition by concentrations". The main aim of the Treaty of Rome indeed was of an economic nature: to create a common market with free movement of goods and services as well as labour and capital; therefore, in order to facilitate real free competition, constraints on enterprises and social costs, mostly to be borne by enterprises, needed to be aligned.

Employee protection allowed for two solutions, both represented in the Directive: either the employees are merely given the same rights against their new employer as they had against the old or additionally the right to have a say in the decision to transfer³³³.

The Directive obliged both transferor and transferee to inform employee representatives of “the reasons for the transfer, the legal, economic and social implications of the transfer for the employees” and “measures envisaged in relation to the employees” (Art 6(1)). It contained neither provisions regarding the nature of those representatives nor an obligation to provide some. Instead, Article 6 (5) provided that

“Member States may provide that where there are no representatives of the employees in an undertaking or business, the employees concerned must be informed in advance when a transfer within the meaning of Article 1(1) is about to take place.”

The UK implemented the Directive more than three years late with the Transfer of Undertakings (Protection of Employment) Regulations 1981, containing the automatic transfer of the contract of employment and introducing a “duty to inform and consult representatives of recognised trade unions”³³⁴. They presented an “important extension

(Paul Davies, Mark Freedland, *Labour Legislation and Public Policy*, Oxford 1993, p. 577f.; Bob Hepple, *Workers' Rights in Mergers and Takeovers: The EEC Proposals*, *in*: *Industrial Law Journal* Vol. 5, No.4, p. 197ff. (p. 203); Catherine Barnard, *EC 'Social' Policy*, *in*: Paul Craig, Gráinne de Burca, *The Evolution of EU Law*, Oxford 1999, p. 479ff. (p. 479f.); Linda Hantrais, *Social Policy in the European Union*, Houndsmills, Basingstoke 1995, p. 1; Michael Shanks, *Introductory Article: The Social Policy of the European Communities*, *in*: *Common Market Law Review* Vol. 14 (1977), p. 375ff. (p. 375f.).)

³³³ Paul Davies, Mark Freedland, *Labour Legislation and Public Policy*, Oxford 1993, p. 578.

³³⁴ Bob Hepple, *The Transfer of Undertakings (Protection of Employment) Regulations*, *in*: *Industrial Law Journal* Vol. 11, No. 1, p. 29ff. (p. 29).

Even though the final bill was far less extensive than the first draft from 1978, it was passed “with

of statutory support of collective bargaining”³³⁵ and thus helped to affirm the single channel system of representation by strengthening the position of trade unions by giving them a legal right to information and consultation.

Directive on Collective Redundancies

The Directive on Collective Redundancies was the first European Community Directive to deal with information and consultation of employees³³⁶. In 1972, the Commission created a first draft, stating that the differences in protecting workers in case of mass redundancies had a

“direct effect on the functioning of the Common Market in as far as they create disparities in conditions of competition which are likely to influence the decisions by undertakings, whether national or multinational, on the distribution of the posts they have to be filled. It must for example be expected that any firm intending to reorganize itself by a plan including the partial or total closedown of certain departments, will decide which departments to close down on the basis, at least in part, of the level of protection offered to the workers. This and other situations can exert pressure against social progress and [be] prejudicial to a balanced overall and regional development within the community since it creates areas of mass unemployment.”³³⁷

remarkable lack of enthusiasm”, solely because the European Commission was about to start proceeding against the UK for failure of implementation (Hepple, cit. opp. p. 29).

³³⁵ Bob Hepple, The Transfer of Undertakings (Protection of Employment) Regulations, *in*: Industrial Law Journal, Vol. 11, No 1, p. 29ff. (p. 29, 38).

³³⁶ Annemarie Mauthner, Die Massenentlassungsrichtlinie der EG und ihre Bedeutung für das deutsche Massenentlassungsrecht, Heidelberg 2004, p. 28f.

³³⁷ Commission of European Communities, Proposal for a Council Directive on the harmonization of the legislation of the Member States relating to redundancies, COM(72) 1400, November 8th, 1972,

It held that

“economic changes and closures of undertakings which these can involve are however an integral part of a development towards more promising activities. It is therefore necessary not to hinder them, but to place this professional mobility within a framework of appropriate guarantees”³³⁸.

The Directive was eventually prompted by multi-national Akzo that based its decision which plant to close down when restructuring on the most “advantageous” dismissal and collective redundancies laws³³⁹. This strategy led to a demand for a “European rule to make such strategies impossible in the future and to lay down a European wide minimum floor of protection in the case of collective dismissals”³⁴⁰ and the Directive on Mass Redundancies was finally adopted in 1975³⁴¹.

It required consultation with “workers’ representatives” on proposed mass redundancies. Hepple and Byre argued in 1989 that it did

p. 1, http://europa.eu.int/comm/employment_social/labour_law/docs/com72_1400_en.pdf, last accessed 20th January 2006.

³³⁸ Commission of European Communities, Proposal for a Council Directive on the harmonization of the legislation of the Member States relating to redundancies, COM(72) 1400, p 2, November 8th, 1972, p. 2, http://europa.eu.int/comm/employment_social/labour_law/docs/com72_1400_en.pdf, last accessed 20th January 2006.

³³⁹ Oda Hinrichs, Kündigungsschutz und Arbeitnehmerbeteiligung bei Massenentlassungen, Baden-Baden 2001, p. 23.

³⁴⁰ Roger Blanpain, European Labour Law, 6th Edition 1999, Nr 549 (p. 334).

³⁴¹ Jeff Bridgford, John Stirling, Employee Relations in Europe, Oxford 1994, p. 229; Jari Hellsten, On Social and Economic Factors in the Developing European Labour Law – Reasoning on Collective Redundancies, Transfer of Undertakings and Converse Pyramids, Work Life in Transition 2005:11, p. 15, http://ebib.arbetslivsinstitutet.se/aio/2005/aio2005_11.pdf, last accessed April 20th, 2006; Annemarie Mauthner, Die Massenentlassungsrichtlinie der EG und ihre Bedeutung für das deutsche Massenentlassungsrecht, Heidelberg 2004, p. 29.

In fact, however, trying to figure out the cheapest way to dismiss as many workers as possible may be seen as “common market effect”. (Hellsten, cit. opp., p. 15).

“not seek to interfere with the machinery and structural arrangements at national level and [did] not define the term ‘workers’ representatives’ except to state that they be the representatives designated by the laws or practices of the member states”³⁴².

The UK decided therefore, in accordance with the tradition of “single channel”, to restrict the right to consultation to recognised trade unions. At the time of implementation through the Employment Protection Act 1975 there was still a statutory recognition process, but when this was removed in 1980 employers were given the power to avoid the obligation to consult by simply not recognising a union³⁴³, putting the effectiveness of the rights provided for by Community law in the hands of employers.

This was one of the issues leading to proceedings against the UK, culminating in the decision of the ECJ in *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*³⁴⁴.

Commission v UK

After a formal note of complaint in 1989 the UK acknowledged its non-compliance in all respects except the issue of representation by recognised trade unions only³⁴⁵.

³⁴² Bob Hepple, Angela Byre, EEC Labour Law in the United Kingdom – A New Approach, *in*: Industrial Law Journal, Vol. 18, No. 3, p. 129ff. (p. 138).

³⁴³ Bob Hepple, Angela Byre, EEC Labour Law in the United Kingdom – A New Approach, *in*: Industrial Law Journal, Vol. 18, No. 3, p. 129ff. (p. 138) (The authors proposed already in 1989 that the UK might not be in compliance with the Directive – a view that was confirmed by the ECJ ruling of June 1994 (see below).), Mark Hall, Mike Terry, The Emerging System of Statutory Worker Representation, *in*: Geraldine Healy, Edmund Heery, Phil Taylor (Ed.), The Future of Worker Representation, Houndsmills, Basingstoke 2004, p. 207ff. (p. 208).

³⁴⁴ Case C-383/92, June 8th, 1994.

³⁴⁵ Commission of the European Communities, Report by the Commission to the Council on progress

Subsequently, two implementation reports were issued by the Commission. The first one from 1991 on the Directive on Collective Redundancies³⁴⁶ considered, inter alia, the issue of representatives problematic, since the limitation of consultation to recognised unions made it possible for an employer to not recognise any union and so to avoid the duty to consult. Also, if consultation took place, UK law didn't require it to be conducted “with a view to reaching an agreement”, as demanded by the Directive³⁴⁷.

The second report from 1992 on the Directive on Transfers of Undertakings also criticised the issue of recognition of unions; additionally, fault was found in that “there is also no legal provision for cases where there is no 'institutional representation’”³⁴⁸.

The Case before the European Court of Justice and its Decision

with regard to implementation of the Directive on the approximation of the laws of the Member States relating to collective redundancies (Council Directive 75/129/EEC of 17 February 1975), SEC(91) 1639 final, Brussels, 1991, p. 77f.; Commission for the European Communities, Commission Report to the Council on progress with regard to the implementation of Directive 77/178/EEC relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (Council Directive 77/187/EEC of 14 February 1977), SEC(92) 857 final, Brussels 1992, p. 136

³⁴⁶ Commission of the European Communities, Report by the Commission to the Council on progress with regard to implementation of the Directive on the approximation of the laws of the Member States relating to collective redundancies (Council Directive 75/129/EEC of 17 February 1975), SEC(91) 1639 final, Brussels, 1991.
(http://aei.pitt.edu/3451/01/000602_1.pdf, last accessed April 20th, 2006).

³⁴⁷ Commission of the European Communities, Report by the Commission to the Council on progress with regard to implementation of the Directive on the approximation of the laws of the Member States relating to collective redundancies (Council Directive 75/129/EEC of 17 February 1975), SEC(91) 1639 final, Brussels, 1991, p. 77.

³⁴⁸ Commission of the European Communities, Commission Report to the Council on progress with regard to the implementation of Directive 77/178/EEC relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (Council Directive 77/187/EEC of 14 February 1977), SEC(92) 857 final, Brussels 1992, p. 135.

The ECJ decided in two rulings from June 8th, 1994³⁴⁹ that the UK had failed to implement the Directives properly in that the national rules only required an employer to consult representatives and “consider” their views, if rejecting them he was merely obliged to “state his reasons”; whereas the Directive itself required consultation “with a view to reaching an agreement”³⁵⁰. More importantly, however, were the parts regarding the restriction of information and consultation rights to recognised unions. The Transfer of Undertakings (Protection of Employment) Regulations 1981 and the Employment Protection Act 1975 had imposed no duty on employers to consult with any other body or indeed to comply with the requirements of the Directives in absence of recognised unions. While at the time of passing of the EPA there were still statutory recognition procedures so that representation could be forced upon an employer, those were repealed in 1980³⁵¹. The Commission held that the Directives required

“employers in every instance ... to inform and consult. If representatives are not designated on a voluntary basis, the Member State in question must then provide appropriate rules under which they can be designated”,

while the UK argued that “those provisions impose an obligation to inform and consult workers' representatives only if national law and practice provide for representatives”³⁵².

The Advocate General followed the opinion of the Commission that

“to make the activity of workers' representatives totally dependent on voluntary recognition by employers is incompatible with the protection of workers as

³⁴⁹ *Commission of the European Communities v United Kingdom*, cases C-382/92 and C-383/92 ([1994] IRLR 392).

³⁵⁰ *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, Case C-383/92; Brian Bercusson, (Case Comment), in: *Common Market Law Review* Vol. 33, No. 3, p. 589ff. (p. 589).

³⁵¹ Opinion of the Advocate General, para 6.

³⁵² Opinion of the Advocate General, para 9.

apparent from the directives in the light of their objective, structure and wording³⁵³”,

concluding that

“on the basis of the foregoing, I cannot accept the United Kingdom's argument that national rules may be regarded as compatible with the fundamental objectives of the two directives in question if they render the provision of information to, and consultation of, workers' representatives in matters of such importance to workers as collective redundancies and transfers of undertakings entirely dependent on the free choice of individual employers³⁵⁴”.

The argument brought forward by the UK in defence was that the Directives were not designed to change existing laws or practices regarding the determination of representatives. In fact, they merely required representatives “provided for by the laws or practices of the member states”³⁵⁵. However, even while accepting this argument, the Court pointed out “that national legislation which made it possible to impede protection unconditionally guaranteed to workers was contrary to EC law”³⁵⁶.

Therefore, the UK failed to provide effective representation by “not providing a mechanism for the designation of workers’ representatives in an undertaking where the employer refuses to recognize such representatives”³⁵⁷, instead relying on representation by voluntarily recognised unions. The provision asking for representatives appointed

³⁵³ Opinion of the Advocate General, para 9.

³⁵⁴ Opinion of the Advocate General, para 12.

³⁵⁵ Simon Deakin, Gillian S Morris, *Labour Law*, 3rd Edition, Reed Elsevier 2001, p. 794.

³⁵⁶ *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, Case C-383/92, para 20.

³⁵⁷ *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, Case C-383/92, para 12.

according to laws or practices of the member states were held to mean that, while member states had the power to decide how representatives are determined, the British interpretation would allow “an employer to frustrate the protection provided for by Articles 2 and 3 of the Directive [and] must [therefore] be regarded as contrary to those Articles”³⁵⁸.

Since the Directive was designed to provide protection for employees, the employers' ability to deny this protection had to be seen as contrary. Additionally, member states were generally required to “take all appropriate measures to ensure that employee representatives are designated with a view to complying with the information and consultation obligations laid down in both Directives”³⁵⁹.

The failure to correctly imply the Directives was aggravated by the fact that trade union recognition had steadily declined since the 1980s (see Graph III), leaving an increasing number of workers without the protection of information and consultation under the directives.

Evaluation of Decision

The decision of the ECJ rendered representation based on voluntary recognition of trade unions insufficient. When the Directive had been implemented with the Employment Protection Act 1975, limiting information and consultation to recognised trade unions, unions were (as can be seen at the membership numbers shown in Graph II) at the height of their power (further enhanced by the statutory recognition procedure contained in the

³⁵⁸ *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, Case C-383/92, paras 14, 27.

³⁵⁹ Mark Hall, Paul Edwards, Reforming the Statutory Redundancy Consultation Procedure, *in*: *Industrial Law Journal*, Vol. 28, No. 4, p. 299ff. (p. 301).

Act). They thus insisted on their monopoly of representation³⁶⁰. The decision of the ECJ deals with the power of the employer to determine whether consultation takes place by recognising or not recognising a union, its requirements to make consultation available independent from the employer could in principle also have been met inside the existing structure of “single channel”, by, for example, introducing new statutory recognition procedures. However, also statutory recognition is unlikely to be achieved in enterprises without a strong union support and would thus leave a large number of workers without representation. Introducing new channels of representation therefore was unavoidable³⁶¹. The TUC (whose changed attitude might be seen in their strong support for the EWC Directive³⁶²) was well aware that the introduction of new statutory recognition procedures would not be enough to fulfill the requirements of the ruling and therefore explained and stressed to unions that the days of trade unions as only channel of representation were over³⁶³.

³⁶⁰ Mark Hall, Beyond Recognition? - Employee Representation and EU Law, *in*: Industrial Law Journal, Vol. 25, No. 1, p. 15ff. (p. 22).

³⁶¹ Paul Davies, A Challenge to Single Channel?, *in*: Industrial Law Journal Vol. 23, p. 272ff. (p. 276ff, 279).

³⁶² John Monks, general secretary of the TUC, welcomed the implementation of the Directive in the UK:

"European Works Councils are an important development in UK industrial relations. Workers in this country were excluded from Works Councils by the Conservatives. I'm pleased the Government has reversed this decision, bringing one step closer the day when UK employees can take their seats alongside their European colleagues on these important bodies."

Press release, issued 5th July 1999, <http://www.tuc.org.uk/international/tuc-2175-f0.cfm>, last accessed February 7th, 2006.

³⁶³ Mark Hall, Beyond Recognition? - Employee Representation and EU Law, *in*: Industrial Law Journal, Vol. 25, No. 1, p. 15ff. (p. 22).

It has also been argued that the decision is a “significant development of [the courts] influence over Member States' labour laws”, it being “the first time that the Court has required a Member State to amend the collective representation structures themselves in order to bring them into line with Community norms.” (Paul Davies, A Challenge to Single Channel?, *in*: Industrial Law Journal Vol. 23, p. 272ff. (p. 275))

Thus Government was forced to implement for the first time representation structures different from the prevalent voluntaristic tradition in order to ensure that consultation would take place even where employers did not voluntarily recognise unions. While it might be argued that, therefore, the decision of the ECJ effectively put an end to the traditional method of ‘single channel’ representation³⁶⁴, Davies pointed out that the Government could comply with the decision without having to change too much: for once, the Directives require only consultation, not collective bargaining or any other more intensive mean of employee-employer relationship. Additionally, there was no obligation for the UK to generally change the system of representation as the decision only applies to the fields of collective redundancies and transfer of undertakings³⁶⁵.

The Collective Redundancies and Transfer of Undertaking (Protection of Employment) (Amendment) Regulations 1995

The Major administration introduced the Collective Redundancies and Transfer of Undertaking (Protection of Employment) (Amendment) Regulations 1995, which have been described as a “grudging, minimalist response to the ECJ's decision, coupled with anti-union and deregulatory measures to sugar the pill”³⁶⁶. They provided for consultation with ‘appropriate representatives’ of those concerned by redundancies or transfers. Representatives from a recognized union or employees of the company

³⁶⁴ Jeff Kerner, European Labour Law – The Soft Option, *in*: New Law Journal Vol. 145, No. 6705, p. 1090ff.; Mark Hall, Paul Edwards, Reforming the Statutory Redundancy Consultation Procedure, *in*: Industrial Law Journal, Vol. 28, No. 4, p. 299ff. (p. 314).

(Paul Davies, A Challenge to Single Channel?, *in*: Industrial Law Journal Vol. 23, p. 272ff. (p. 279).)

³⁶⁵ Paul Davies, A Challenge to Single Channel?, *in*: Industrial Law Journal Vol. 23, p. 272ff. (p. 276).

³⁶⁶ Mark Hall, Beyond Recognition? - Employee Representation and EU Law, *in*: Industrial Law Journal, Vol. 25, No. 1, p. 15ff. (p. 17).

elected as representatives by the affected employees are deemed appropriate³⁶⁷. Additionally, the provisions allowed for “one-off” representation in the form that the employees in question elect representatives when required, standing bodies were not obligatory³⁶⁸. To ensure their independence, representatives had to be given protection of dismissal and certain facilities³⁶⁹. The employer retained the right to decide with which kind of representative he wishes to consult, thus having the freedom “of bypassing existing union machinery and consulting elected representatives instead”. He also had the power to determine the election process and the number of representatives to be elected³⁷⁰.

From an employees’ point of view, the new regulations were a pejoration in two respects: first, the threshold number of proposed redundancies was raised to 20 where

³⁶⁷ Mark Hall, *Beyond Recognition? - Employee Representation and EU Law*, in: *Industrial Law Journal*, Vol. 25, No. 1, p. 15ff. (p. 17); Mark Hall, Paul Edwards, *Reforming the Statutory Redundancy Consultation Procedure*, in: *Industrial Law Journal*, Vol. 28, No. 4, p. 299ff. (p. 301f.). The regulation provides no mode for the election and no procedure for employees unhappy with the election-mode provided by the employer to complain, nor are there mechanisms to make sure representatives are independent from the employer. Hall consequently noted that “these two factors in particular appear to expose the whole consultation process to potential employer control and will inevitable give rise to dispute over whether the regulations are consistent with the terms of the ECJ judgements, especially the Court’s strictness against allowing employers to impede or frustrate the protection provided for employees by the two Directives.” (Hall, *opp. cit.* p. 17).

³⁶⁸ Mark Hall, *Beyond Recognition? - Employee Representation and EU Law*, in: *Industrial Law Journal*, Vol. 25, No. 1, p. 15ff. (p. 17).

³⁶⁹ Paul Davies, *A Challenge to Single Channel?*, in: *Industrial Law Journal* Vol. 23, p. 272ff. (p. 281).

³⁷⁰ Mark Hall, *Beyond Recognition? - Employee Representation and EU Law*, in: *Industrial Law Journal*, Vol. 25, No. 1, p. 15ff. (p. 17); Mark Hall, Paul Edwards, *Reforming the Statutory Redundancy Consultation Procedure*, in: *Industrial Law Journal*, Vol. 28, No. 4, p. 299ff. (p. 302). However, a study undertaken by the DTI suggests that hardly any use was made of the possibility of union avoidance: only 4 out of 2048 cases seem to have taken advantage of that route, in one case only after the employees, given the choice between union representation and representation by elected representatives, chose the second. As one manager put it: “If there is a recognised union, there is no reason why you shouldn’t use them. It is the sign of a working relationship, so the worst thing is to exclude them”. (Hall and Edwards, *cit. opp.*, p. 307).

one used to be enough; secondly, consultation now had to take place “in good time” where it used to be at “the earliest opportunity”. Both changes were perfectly in line with the Directive, nevertheless they impaired the situation of British employees; the Department for Trade and Industry estimated that due to the new threshold about 96% of UK businesses would be freed from the duty to consult³⁷¹.

However, British law now provided explicitly for “non-union, statutory employee representatives” even though restricted to mass redundancies and transfer of undertakings and supplementary to trade union representation³⁷². But criticism questioning whether the new regulations fulfilled the EC requirements persisted³⁷³, focussing on the fact that employers were able to avoid (even) recognised unions for consultation and on the problem of representatives’ independence from the employer³⁷⁴. It was also pointed out that there were neither procedures laid down as to how representatives were to be elected nor any under which employees could challenge the election mechanisms proposed by the employer³⁷⁵. Finally, the idea of ad hoc

³⁷¹ Mark Hall, Beyond Recognition? - Employee Representation and EU Law, *in*: Industrial Law Journal, Vol. 25, No. 1, p. 15ff. (p. 17f.)

³⁷² Mark Hall, Andrea Broughton, Mark Carley, Keith Sisson, Works Councils for the UK? - Assessing the Impact of the EU Employee Consultation Directive, London 2002, p. 26; Mark Hall, Paul Edwards, Reforming the Statutory Redundancy Consultation Procedure, *in*: Industrial Law Journal, Vol. 28, No. 4, p. 299ff. (p. 314); Manfred Weiss, Arbeitnehmermitwirkung in Europa, *in*: Neue Zeitschrift für Arbeitsrecht 2003, p. 177ff. (p. 178).

The ECJ ruling also led to the Health and Safety (Consultation with Employees) Regulations 1996 (Hall and Edwards, *opp. cit.*, p. 314).

³⁷³ Mark Hall, Paul Edwards, Reforming the Statutory Redundancy Consultation Procedure, *in*: Industrial Law Journal, Vol. 28, No. 4, p. 299ff. (p. 299); *see* Mark Hall, Beyond Recognition? - Employee Representation and EU Law, *in*: Industrial Law Journal, Vol. 25, No. 1, p. 15ff. (p. 17).

³⁷⁴ Mark Hall, Paul Edwards, Reforming the Statutory Redundancy Consultation Procedure, *in*: Industrial Law Journal, Vol. 28, No. 4, p. 299ff. (p. 306, 310); Mark Hall, Beyond Recognition? - Employee Representation and EU Law, *in*: Industrial Law Journal, Vol. 25, No. 1, p. 15ff. (p. 18).

³⁷⁵ Mark Hall, Beyond Recognition? - Employee Representation and EU Law, *in*: Industrial Law Journal, Vol. 25, No. 1, p. 15ff. (p. 18).

The only remedy available were tribunal applications for a protective award (Hall, *cit. opp.*, p. 18).

representatives being able to provide for meaningful and effective consultation in such rather complicated situations as transfer of undertakings or mass redundancies was questioned³⁷⁶ - in fact, one could assume that the Government was intent on implementing the ruling of the ECJ with the aim of rendering information and consultation as ineffective as possible while still adhering to the letters of the decision. After all, it is a striking contrast between the elaborate regulations concerning ballots and elections within unions and the absence of procedures for election or complaints under the 1995 regulations³⁷⁷.

The regulations were challenged by Britain's two largest unions, UNISON & GMB, and the teaching union NASUWT. Counsel for the applicants stated that the Directive required consultation to be undertaken with "a view to reaching agreement". Therefore, representatives needed to be properly independent and have sufficient resources. The regulations were held to be defective because the choice of representatives was partly left to the employer³⁷⁸, and because representatives were not substantially equipped; furthermore, no adequate provision for complaint was provided. Another criticism was that in order to comply with the regulations, not only was it enough for the employer to simply *invite* for elections (no matter if they subsequently took place) but also to invite *any* of the employees who might be dismissed - therefore an employer might chose to just invite especially apathetic employees; thus avoiding elections and therefore consultation. Since the employer nevertheless would be in compliance with the Act, a

³⁷⁶ Mark Hall, Beyond Recognition? - Employee Representation and EU Law, *in*: Industrial Law Journal, Vol. 25, No. 1, p. 15ff. (p. 18).

³⁷⁷ Mark Hall, Beyond Recognition? - Employee Representation and EU Law, *in*: Industrial Law Journal, Vol. 25, No. 1, p. 15ff. (p. 18).

³⁷⁸ Even if an election had taken place, it was up to the employer to consult with the elected representatives, a recognised trade union or representatives elected for some other purpose.

dismissee not invited would have no reason to bring a complaint³⁷⁹.

The court held, however, that

“the Regulations do properly implement the Directives 75/129 and 77/187 so far as they concern consultation with affected employees, in particular the Regulations do not leave open the possibility that employers may impede protection unconditionally guaranteed to employees by Directives 75/129 and 77/187, and are thus not incompatible with Community law”³⁸⁰.

Lord Justice Otton stated that the Directives did not require member states to lay down detailed mechanisms as to how elections of representatives had to take place and that the term “appropriate representatives” implied that those were objective and not dependent from the employer³⁸¹.

The case brought by UNISON, GMB and NASUWT raises the question as to what constitutes effective consultation. In the view of the court, effective consultation was guaranteed because sanctions were present should the employer fail to comply with his obligations to provide representatives; furthermore, employees dismissed without there having been consultation or invitation to consultation could log a complaint³⁸². It appears, however, as if the most important issues of effective consultation were not addressed in the judgement. While the way representatives are elected is important, the question which rights those representatives have is more significant. In order to be able

³⁷⁹ *R v Secretary of State for Trade and Industry, ex parte. UNISON and Others* [1997] 1 CMLR 459 at 473, para 30, 31, 35; Paul Skidmore, Worker Rights – A Euro-Litigation Strategy, *in*: Industrial Law Journal, Vol. 25, No. 3, p. 225ff. (p. 229).

³⁸⁰ *R v Secretary of State for Trade and Industry, ex parte. UNISON and Others* [1997] 1 CMLR 459 at 480, para 54.

³⁸¹ *R v Secretary of State for Trade and Industry, ex parte. UNISON and Others* [1997] 1 CMLR 459 at 480, para 52.

³⁸² *R v Secretary of State for Trade and Industry, ex parte. UNISON and Others* [1997] 1 CMLR 459 at 477, para 48.

to effectively represent employees, information rights are necessary. But a simple right to be “heard” does not constitute effective consultation. Without a possibility to influence the employer's decision, be it a veto-right or the right to impose sanctions, “consultation” is just a democratic fig leaf. It must be guaranteed that consultation is meaningful and the employer will not have the opportunity of simply going through the motions in order to fulfil his obligations. It was explained in *Moore v Clares Equipment Ltd*³⁸³ that

“the very process of consultation is one where parties attempt to reach an agreement on a fair exchange of views and by reason of the fact that the applicant did not see the basis of the decision against him and have an opportunity of challenging it and putting his own side of the matter and indeed any further or wider suggestions that he wished to make, we hold that there was not proper and effective consultation in this case... .”

However, the Act did succeed in securing that it is now in the hands of the employees whether there are representatives or not. The situation is, in fact, similar to that in Germany, where consultation by works councils is deemed sufficient under the Directives. The *BetrVG* allows for the election of representatives, if those actually *are* elected is up to the employees.

The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999

The Blair Administration amended the regulations in 1999. The Government had been of the opinion that the 1995 Regulations “still [did] not provide a clear and satisfactory

³⁸³ *Moore v Clares Equipment Ltd. EAT 322/94.*

framework for the necessary information and consultation”³⁸⁴, but there had also been a fresh complaint by the Commission, claiming that the Directives still had not been properly implemented, especially in view of the determination of representatives and the sanctions provided³⁸⁵.

The amendments, coming into force on July 28th, 1999 and applying to transfers taking place from November 1st, 1999, made consultation with a recognised trade union, where present, mandatory and thus shut off the possibility for employers to avoid union structures³⁸⁶. They still allowed for one-off consultation; standing representation bodies were allowed but not required³⁸⁷.

The regulations have been criticised for the fact that the decision whom to consult is in the discretion of employers when there is no recognised trade union present. Employers can largely determine how many representatives are to be elected, too, and whether different groups shall elect different representatives. There is no provision to ensure that representatives are independent³⁸⁸. Although there is now a right to complain to an

³⁸⁴ Mark Hall, Paul Edwards, Reforming the Statutory Redundancy Consultation Procedure, *in*: Industrial Law Journal, Vol. 28, No. 4, p. 299ff. (p. 300).

³⁸⁵ Simon Deakin, Gillian S Morris, Labour Law, 3rd Edition, Reed Elsevier 2001, p. 795; Mark Hall, Paul Edwards, Reforming the Statutory Redundancy Consultation Procedure, *in*: Industrial Law Journal, Vol. 28, No. 4, p. 299ff. (p. 303).

³⁸⁶ Michael Terry, Employee Representation: Shop Stewards and the New Legal Framework, *in*: Paul Edwards (Ed.), Industrial Relations – Theory and Practice, 2nd Edition, Oxford 2003, p. 257ff. (p. 275); Mark Hall, Paul Edwards, Reforming the Statutory Redundancy Consultation Procedure, *in*: Industrial Law Journal, Vol. 28, No. 4, p. 299ff. (p. 299, 304).

³⁸⁷ Department of Trade and Industry, Employees’ Information and Consultation Rights on Transfers of Undertakings and Collective Redundancies, 1998, quoted in: Mark Hall, Paul Edwards, Reforming the Statutory Redundancy Consultation Procedure, *in*: Industrial Law Journal, Vol. 28, No. 4, p. 299ff. (p. 316).

The reason given by Government for the facility to elect one-off representatives was that it would be “unnecessary and unreasonable to require that appropriate representatives be in place regardless of whether or not a transfer of an undertaking or a collective redundancy situation is actually in prospect” (Hall and Edwards, cit. opp., p. 316).

³⁸⁸ Simon Deakin, Gillian S Morris, Labour Law, 3rd Edition, Reed Elsevier 2001, p. 802f.

employment tribunal that representatives were not appropriate or that the election was faulty³⁸⁹, Deakin and Morris still argue that “the lack of any requirement for representatives to be independent would appear to allow employers even now to frustrate the protection for workers provided by the Directive”³⁹⁰. However, the new regulations restored the primacy of trade unions and thus strengthened single channel.

The Directive on European Works Councils

The Commission made a first proposal for a Directive on European Works Councils in December 1990; pointing out that

“the completion of the internal market is bound to generate a process of concentrations of undertakings, cross-border mergers, take-overs, joint-ventures and consequently, a transnationalisation of undertakings; whereas, if economic activities are to develop in a harmonious fashion, this situation requires that undertakings and groups of undertakings operating in more than one Member State must inform and consult the representatives of their employees affected by their decisions³⁹¹”.

This was thought to have a “direct effect on the internal market and consequently needs to be remedied³⁹²”. In principle such consultation could have been done with national

³⁸⁹ Simon Deakin, Gillian S Morris, *Labour Law*, 3rd Edition, Reed Elsevier 2001, p. 803.

³⁹⁰ Simon Deakin, Gillian S Morris, *Labour Law*, 3rd Edition, Reed Elsevier 2001, p. 803.

³⁹¹ Proposal for a Council Directive on the establishment of a European Works Council in Community-scale undertakings or groups of undertakings for the purposes of informing and consulting employees, COM(90) 581 final, submitted by the Commission on 12 December 1990 (91/C 39/11), *in*: Official Journal of the European Communities, 15. 2. 1991, No c 39/10.

³⁹² Proposal for a Council Directive on the establishment of a European Works Council in Community-scale undertakings or groups of undertakings for the purposes of informing and consulting employees, COM(90) 581 final, submitted by the Commission on 12 December 1990 (91/C 39/11), *in*: Official Journal of the European Communities, 15. 2. 1991, No c 39/10.

representation bodies, but

“...procedures for informing and consulting employees as embodied in legislation or practice in Member States are often inconsistent with the transnational structure of the entity which takes the decisions affecting those employees; whereas this may lead to unequal treatment of employees affected by the decisions of one and the same undertaking, or group of undertakings³⁹³”.

It was also held that the Directives on Transfer of Undertakings and Collective Redundancies would not cover all situations that might arise and, especially, those would not “extend to situations in which the decision-making centre is not situated in the Member State in which the employees affected by its decision are employed³⁹⁴”.

Therefore,

“..appropriate provisions must be adopted to ensure that the employees of Community-scale undertakings or groups of undertakings are properly informed and consulted in cases where decisions likely to affect them are taken outside the Member State in which they are employed³⁹⁵”.

The Commission was therefore of the opinion that “a European Works Council must, in principle, be set up³⁹⁶”.

³⁹³ Proposal for a Council Directive on the establishment of a European Works Council in Community-scale undertakings or groups of undertakings for the purposes of informing and consulting employees, COM(90) 581 final, submitted by the Commission on 12 December 1990 (91/C 39/11), *in*: Official Journal of the European Communities, 15. 2. 1991, No c 39/10.

³⁹⁴ Proposal for a Council Directive on the establishment of a European Works Council in Community-scale undertakings or groups of undertakings for the purposes of informing and consulting employees, COM(90) 581 final, submitted by the Commission on 12 December 1990 (91/C 39/11), *in*: Official Journal of the European Communities, 15. 2. 1991, No c 39/10.

³⁹⁵ Proposal for a Council Directive on the establishment of a European Works Council in Community-scale undertakings or groups of undertakings for the purposes of informing and consulting employees, COM(90) 581 final, submitted by the Commission on 12 December 1990 (91/C 39/11), *in*: Official Journal of the European Communities, 15. 2. 1991, No c 39/10.

³⁹⁶ Proposal for a Council Directive on the establishment of a European Works Council in Community-

The Directive on European Works Councils (EWCs) was adopted in September 1994 under the Protocol on Social Policy. Connected to the Treaty of Maastricht, this allowed, due to the British opt-out, the adoption of Social Policy Issues without the agreement of the UK³⁹⁷. Thus originally the Directive did not apply to the UK, but since it aimed at undertakings with a certain number of employees in at least two member states, a number of UK-based enterprises employing the threshold number of workers elsewhere in the scope of the Directive had to comply with it nonetheless³⁹⁸. After the “opt-in” to the Social Chapter with the Amsterdam Treaty of 1997, the EWC Directive was extended to the UK in December 1997³⁹⁹.

Implementation was undertaken via the Transnational Information and Consultation of Employees Regulations 1999, coming into force on January 15th, 2000, a month after the deadline for implementation⁴⁰⁰. Members of “Special Negotiation Bodies” (SNBs) are to be determined by ballot of the UK workforce; if a consultative committee is existent, members are to be selected by it. For statutory EWCs, UK members are either to be elected by representatives representing all UK employees or, again, by ballot in which all affected UK employees are taking place⁴⁰¹. Trade unions therefore are

scale undertakings or groups of undertakings for the purposes of informing and consulting employees, COM(90) 581 final, submitted by the Commission on 12 December 1990 (91/C 39/11), *in*: Official Journal of the European Communities, 15. 2. 1991, No c 39/10.

³⁹⁷ Herman Knudsen, *Employee Participation in Europe*, London 1995, p. 136; IDS Brief Employment Law and Practice No 526, October 1994, p. 16ff. (p. 16).

³⁹⁸ IDS Brief Employment Law and Practice No 526, October 1994, p. 16ff. (p. 17); Mark Carley, Mark Hall, *The Implementation of the European Works Council Directive*, *in*: *Industrial Law Journal*, Vol. 29, No. 2, p. 103ff. (p. 107).

In 1994 it was estimated that more than 100 UK enterprises had to set up EWCs. (IDS Brief, *opp. Cit*).

³⁹⁹ Mark Carley, Mark Hall, *The Implementation of the European Works Council Directive*, *in*: *Industrial Law Journal*, Vol. 29, No. 2, p. 103ff. (p. 103, 112f.).

⁴⁰⁰ Mark Carley, Mark Hall, *The Implementation of the European Works Council Directive*, *in*: *Industrial Law Journal*, Vol. 29, No. 2, p. 103ff. (p. 113).

⁴⁰¹ Mark Carley, Mark Hall, *The Implementation of the European Works Council Directive*, *in*: *Industrial Law Journal*, Vo. 29, No. 2, p. 103ff. (p. 114f.)

virtually excluded from the process; union representatives, however, have, as other employee representatives, the right to request information and prompt the procedure of setting up a SNB⁴⁰².

The implementation of EWCs into British Law has been dubbed a “further landmark in the ‘Europeanisation’ of UK labour law”, because it created a “statutory standing works-council-type employee representation body” and because it required the Government to implement another issue-specific representation machinery into the law⁴⁰³. Additionally, neither did the Directive require union participation on EWCs or on the procedures on information and consultation⁴⁰⁴, nor did the British implementation require unions or union membership; rather, representatives were to be elected by the whole work-force⁴⁰⁵. While the regulations therefore could be interpreted as another step away from unions’ monopoly on representation; it has to be kept in mind that their actual scope is restricted to certain issues and larger companies. Whether they actually have any impact on national industrial relations therefore remains doubtful.

While a study by Eberwein, Tholen and Schuster conducted in 2002 found that the EWC

⁴⁰² Mark Carley, Mark Hall, The Implementation of the European Works Council Directive, *in*: Industrial Law Journal, Vo. 29, No. 2, p. 103ff. (p. 114).

⁴⁰³ Mark Carley, Mark Hall, The Implementation of the European Works Council Directive, *in*: Industrial Law Journal, Vol. 29, No. 2, p. 103ff. (p. 123).
The representation machinery was necessary for electing UK members to Special Negotiation Bodies and EWCs where there is no recognized trade union or other representation arrangement (Carley and Hall, cit. opp., p. 123)

⁴⁰⁴ Dieter Krimphove, Europäisches Arbeitsrecht, 2nd Edition, München 2001, p. 424.
However, a participation of unions is possible either by an agreement of the social partners according to Art 139 of the European Treaty or by special arrangements when concluding understandings under Art 6 of Directive 94/45/EG. (Krimhove, opp. cit., p. 424).

⁴⁰⁵ Howard Gospel, Paul William, Dilemmas in Worker Representation – Information, Consultation and Negotiation, *in*: Howard Gospel, Stephen Wood (Ed.), Representing Workers – Union Recognition and Membership in Britain, London 2003, p. 144ff. (p. 148).

Directive had lead to a discussion in the UK about representative structures above the workplace level and, according to responses by union representatives, EWCs had also led to the “establishment of new national structures of worker representation”; this assessment is contrasted by the responses of employers, who only “partly saw the necessity to think over the structure of national worker representation”⁴⁰⁶. Whatever their practical impact maybe, the regulations constitute a marked difference, if only in principle, from TUPE 1999, enacted at roughly the same time, which had asserted the primacy of unions.

An effect of the regulations, according to British and German trade unions, has been a strengthening of the cooperation between trade unions in Europe and an enhancement of the importance of European trade union federations who play a significant role in the setting up of EWCs and in coordinating their work⁴⁰⁷.

The Directive on Information and Consultation

Background

Demands for European legislation on consultation and workers’ involvement were triggered by Renault's decision to close its Vilvoorde plant in Belgium⁴⁰⁸. After UNICE

⁴⁰⁶ Wilhelm Eberweis, Jochen Tholen, Joachim Schuster, *The Europeanisation of Industrial Relations – National and European Processes in Germany, UK, Italy and France*, Aldershot 2002, p. 46f.

⁴⁰⁷ Wilhelm Eberweis, Jochen Tholen, Joachim Schuster, *The Europeanisation of Industrial Relations – National and European Processes in Germany, UK, Italy and France*, Aldershot 2002, p. 47.

⁴⁰⁸ Brian Bercusson, *The European Social Model Comes to Britain*, in: *Industrial Law Journal*, Vol. 31, No 3, p. 209ff. (p. 216f.).

In February 1997 Renault released a press statement regarding the closure of its Vilvoorde plant (encompassing about 3,100 redundancies and a further loss of about 1,000 jobs at sub-contractors) without having informed the workers affected beforehand, thereby breaking Community and

(European Employers' Association) had refused to negotiate with the European Trade Union Conference (ETUC) on a framework agreement, the European Commission drafted a Proposal for a Council Directive on Information and Consultation in November 1998⁴⁰⁹. Eventually, Directive 2002/14/EC⁴¹⁰ of the European Parliament and the Council of 11th March 2002, which provided for a “general framework for informing and consulting employees in the European Community”, was adopted⁴¹¹.

Implementation in the UK and proposed Effects

The Directive was implemented into UK law by amendments to the Employment Relations Act in 2004 and the Information and Consultation of Employees Regulations

Belgian law. The decision was called final, thus rendering possible discussion with workers' representatives useless. Vilvoorde in fact was one of the most productive plants in which an agreement on flexibility and investment had been signed four years earlier to secure employment. Renault claimed to adhere to the letter of Community law, claiming that since the decision to restructure was of a transnational nature, it was not covered by Community law and the Directive on Collective Redundancies did not apply. Apart from that, it held to have signed an agreement with the European Metalworking Federation, the International Federation of Professional and Managerial Staff in the Metalworking Industry and French, Belgian and Portuguese unions that didn't require consultation prior to a decision. However, a ruling of the Belgian Labour Court from April 1997 declared that Renault had adhered neither to the obligations to inform and consult nor to procedures arising from collective labour agreements no. 9 and 24. The Court cancelled the closure of the plant until the duties to inform and consult had been obliged.

(Isabelle Schönmann, Stefan Clauwaert, Wiebke Warneck, Information and Consultation in the European Community, Implementation Report of Directive 2002/14/EC (Draft Report), Brussels 2005, p. 10f.).

⁴⁰⁹ Brian Bercusson, The European Social Model Comes to Britain, *in*: Industrial Law Journal, Vol. 31, No 3, p. 209ff. (p. 216f.).

⁴¹⁰ However, major changes were necessary for the passing of the Directive, especially the UK and Ireland only agreed after an extension of the period for implementation to 4 years (Schönmann/Clauwaert/Warneck, cit. opp., p. 7).

⁴¹¹ Isabelle Schönmann, Stefan Clauwaert, Wiebke Warneck, Information and Consultation in the European Community, Implementation Report of Directive 2002/14/EC (Draft Report), Brussels 2005, p. 7.

2004 (No. 3426), which came into force on April 6th, 2005⁴¹².

While it has been argued that it “will take the UK further away from its voluntaristic traditions”⁴¹³; the practical impact of the regulations remains to be seen. There now is, for the first time, a statutory right to be informed and consulted on a wide range of issues, but the regulations allow for flexibility in the way representation is provided for; in particular they do not prescribe the setting-up of national works councils. Indeed, a main objective of the Government when implementing the Directive has been to provide enterprises with as much flexibility as possible⁴¹⁴.

The creation of new representation structures under the regulations depends on either a request by 10% of the employees (but at least 15 employees), or the employer initiating the process. If a pre-existing agreement (PEA) is present, a ballot is necessary in addition to a valid employee request in order to set up new structures. An approval by 40% of the employees and a majority of those who vote, will oblige employers to negotiate an information and consultation agreement with representatives of employees; if in these negotiations no agreement is met, the standard procedures of the regulations will apply. If the necessary margin of approval is not reached, the PEA will continue to

⁴¹² Isabelle Schönmann, Stefan Clauwaert, Wiebke Warneck, Information and Consultation in the European Community, Implementation Report of Directive 2002/14/EC (Draft Report), Brussels 2005, p. 16.

⁴¹³ Mark Hall, Mike Terry, The Emerging System of Statutory Worker Representation, *in*: Geraldine Healy, Edmund Heery, Phil Taylor (Ed.), *The Future of Worker Representation*, Houndsmills, Basingstoke 2004, p. 207ff. (p. 219).

⁴¹⁴ Pascale Lorber, Implementing the Information and Consultation Directive in Great Britain: A New Voice at Work, *in*: *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 22, No. 2, p. 231ff. (237); Mark Hall, Assessing the Information and Consultation of Employees Regulations, *in*: *Industrial Law Journal*, Vol. 34, No. 2, p. 103ff. (p. 111); Mark Hall, Duncan Adam, Aristeia Koukiadaki, Results of the WMERF information and consultation survey, <http://www.wbs.ac.uk/downloads/research/wmerf-1205.pdf>, last assessed November 26th, 2006. The survey was carried out by the Warwick Business School in September/October 2005.

exist and a three-year moratorium for a new request will apply⁴¹⁵. This preference for PEAs might be explained with the fact that CBI as well as TUC were eager to protect existing agreements where in place⁴¹⁶. The standard procedures provide for elected representatives; negotiated agreements may either provide for elected or appointed representatives or direct consultation. Since the parties may decide how representatives are chosen, they are free to agree on union representatives or even union officials to represent unionised parts of the workforce⁴¹⁷. Trade unions, while not explicitly mentioned, may also act as information and consultation partners via PEAs.

The fact that employers need not provide information and consultation mechanisms unless 10% of the employees request so might seriously undermine the impact of the legislation. Furthermore, PEAs (which are hard to overturn) are able to pre-empt use of the regulations⁴¹⁸, so that employers are in a position to considerably weaken their effect. They are able to pursue a policy of “risk assessment” by hoping that employees will not trigger negotiations, and they might also install “employer-friendly” PEAs in line with the requirements of the regulations. In fact, they might even create PEAs not

⁴¹⁵ Pascale Lorber, Implementing the Information and Consultation Directive in Great Britain: A New Voice at Work, *in: The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 22, No. 2, p. 231ff. (243, Table 1).

⁴¹⁶ Mark Hall, Assessing the Information and Consultation of Employees Regulations, *in: Industrial Law Journal*, Vol. 34, No. 2, p. 103ff. (p. 110); Pascale Lorber, Implementing the Information and Consultation Directive in Great Britain: A New Voice at Work, *in: The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 22, No. 2, p. 231ff. (237f.).
The TUC did hold, however, that there must be a way to overturn agreements not based on genuine workforce approval (Hall, cit. opp., p. 110).

⁴¹⁷ Pascale Lorber, Implementing the Information and Consultation Directive in Great Britain: A New Voice at Work, *in: The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 22, No. 2, p. 231ff. (248); Mark Hall, Assessing the Information and Consultation of Employees Regulations, *in: Industrial Law Journal*, Vol. 34, No. 2, p. 103ff. (p. 114).

⁴¹⁸ Mark Hall, A cool response to the ICE Regulations? Employer and trade union approaches to the new legal framework for information and consultation, *in: Industrial Relations Journal*, Vol. 37, Issue 5, p. 456ff. (p. 4567).

fulfilling the requirements, hoping those will not be challenged by employees⁴¹⁹.

At the time of writing, the regulations have been in force for about 20 months. While this is still too early for a profound assessment, there are a few indicators as to their effects.

For example, according to a 2004 survey by CBI, numbers for companies with a permanent mechanism for information and consultation rose from 35% in 2002 to 47% in 2003 and 49% in 2004. Another 20% were stating that they were planning to introduce mechanisms over the next 12 months⁴²⁰. In an IRS survey from autumn 2005, 68% of employers reported some sort of permanent consultation body while only 49% had done so in 2004⁴²¹.

Of those being able to state when the consultation body had been set up, 20% reported it had been done in 2005 and a further 22% in 2003 or 2004. Moreover, when directly asked whether they had made any changes to the information and consultation practices in the last two years and, if so, whether this was in order to comply with the new legislation, 49% answered that they had made changes but only 32% of these held that the changes were made with respect to the ICE regulations (in 2004, 25% had reported they had made changes in the previous year as a response to the regulations and 32% planned to do so over the next 12 months). However, if including those who said that the changes were made partially to comply with the legislation, the number rises to 65%. Furthermore, 16% said they were planning changes over the next two years, nearly all

⁴¹⁹ Mark Hall, *Assessing the Information and Consultation of Employees Regulations*, in: *Industrial Law Journal*, Vol. 34, No. 2, p. 103ff. (p. 118, 124).

⁴²⁰ Mark Hall, *Assessing the Information and Consultation of Employees Regulations*, in: *Industrial Law Journal*, Vol. 34, No. 2, p. 103ff. (p. 120).

⁴²¹ Sara Welfare, *High on the Agenda: Employee Information and Consultation*, in: *IRS Employment Review* 833, October 2005, p. 8ff. (p. 14).

of which were planned in order to or at least partly in order to comply with the ICE Regulations. However, the majority of these group merely planned reviewing or improving existing agreements, only a small minority planned or were setting up a consultative forum⁴²². This number correspond with findings from the Warwick survey (2005) that found that 37% of respondents had modified their arrangements, another 20% intended to and 7% planned to introduce new arrangements⁴²³.

Information and consultation under the ICE Regulations depends, when no PEA is present, on initiative from employees. However, only two of the 160 respondents to the IRS survey reported a request for new information and consultation agreements made by employees and only 5 (3%) expected such a request in the future. Furthermore, in the two workplaces that had reported in 2004 that they were expecting a request, no such challenge had been forthcoming; however, this might be due to the fact that the organisations in question had improved their consultation mechanisms⁴²⁴.

When in 2004 only 20% of the respondents to the IRS survey had put up PEAs for approval, in 2005 that number had risen to 32% (plus another 14% reporting that they planned to do so), 92% of which had sought the approval in the previous year, a strong indicator that the new legislation had been the motive⁴²⁵.

While these figures show a clear rise in information and consultation arrangements

⁴²² Sara Welfare, High on the Agenda: Employee Information and Consultation, *in*: IRS Employment Review 833, October 2005, p. 8ff. (p. 14).

⁴²³ Sara Welfare, High on the Agenda: Employee Information and Consultation, *in*: IRS Employment Review 833, October 2005, p. 8ff. (p. 12ff.); Mark Hall, Assessing the Information and Consultation of Employees Regulations, *in*: Industrial Law Journal, Vol. 34, No. 2, p. 103ff. (p. 120), Mark Hall, Duncan Adam, Aristeia Koukiadaki, Results of the WMERF information and consultation survey, <http://www.wbs.ac.uk/downloads/research/wmerf-1205.pdf>, last assessed November 26th, 2006.

⁴²⁴ Sara Welfare, High on the Agenda: Employee Information and Consultation, *in*: IRS Employment Review 833, October 2005, p. 8ff. (p. 14).

⁴²⁵ Sara Welfare, High on the Agenda: Employee Information and Consultation, *in*: IRS Employment Review 833, October 2005, p. 8ff. (p. 14).

ascribable to the new regulations, an IRS survey from 2006 depicts a downturn not only in the setting up of new arrangements, but also in the total number of information and consultation bodies in respect to the figures for 2005. When in 2005 76% of employers responding said they kept staff informed on changes to products or services, only 60% said so in 2006. Similarly, when in 2005 74% of workplaces had a permanent consultation body in place, only 55% did so in 2006, a number closer to the 2004 figure of 49%. Of those that reported changes in 2006, only 19% held that the changes were wholly or partly in order to comply with the regulations⁴²⁶.

Although these figures are not based on matched samples, they do show a trend for information and consultation to peak in the year of implementing the ICE regulations and to approach the “normal” figures thereafter; however, there is still an indication that the regulations are making an impact. After all, almost a third of the consultative bodies found in the survey had been set up in 2003 or later and thus obviously in response to the regulations⁴²⁷.

Unions profit from the new regulations. Findings by the TUC show that the percentage of recognition agreements including information and consultation rose from 59% in 2001/02 to 79% in 2002/03. Results from a Labour Research Department survey in 2004 picture an increase in the number of unions being informed and consulted but also a recent “sharp increase” (from 11% in 2002 to 25% in 2004) in information and consultation bodies involving non-union employees⁴²⁸. Also, a survey by the Warwick

⁴²⁶ A two-way process: informing and consulting employees, IRS Employment Review 859, November 2006, p. 9, 12, 15.

⁴²⁷ A two-way process: informing and consulting employees, IRS Employment Review 859, November 2006, p. 9, 12, 15.

⁴²⁸ Mark Hall, Assessing the Information and Consultation of Employees Regulations, *in*: Industrial Law Journal, Vol. 34, No. 2, p. 103ff. (p. 120).

Business School held in autumn 2005 found that 50% of the respondents consulted via recognised trade unions, while 41% had an information and consultation body or employee forum⁴²⁹. Not surprisingly, the Warwick survey found in 2005 that union-based information and consultation was most popular in unionised workplaces, being present in 77% of these. Information and consultation bodies were present in 46% of unionised workplaces, slightly above the average of all respondents⁴³⁰. However, according to the Warwick survey, the most popular practice was to consult with employees directly, done by almost 60% of respondents and 64% of unionised workplaces, whereas only 5% reported they had no current agreements (obviously, most organisation used more than one method)⁴³¹.

Conclusion

While these figures show that information and consultation procedures are in motion, it is still too early to determine the final effects of these changes.

According to surveys, information and consultation arrangements are becoming more widespread on a wider range of topics; and, while the available data has shown that a significant percentage of those agreements involves unions that still do play a major role in workplace industrial relations, with recognition rates of about 30% and a union density around 30% (see Graphs II and III) representation under the new regulations can

⁴²⁹ Mark Hall, Duncan Adam, Aristeia Koukiadaki, Results of the WMERF information and consultation survey, <http://www.wbs.ac.uk/downloads/research/wmerf-1205.pdf>, last assessed November 26th, 2006.

⁴³⁰ Mark Hall, Duncan Adam, Aristeia Koukiadaki, Results of the WMERF information and consultation survey, <http://www.wbs.ac.uk/downloads/research/wmerf-1205.pdf>, last assessed November 26th, 2006.

⁴³¹ Mark Hall, Duncan Adam, Aristeia Koukiadaki, Results of the WMERF information and consultation survey, <http://www.wbs.ac.uk/downloads/research/wmerf-1205.pdf>, last assessed November 26th, 2006.

not solely rely on unions. Therefore, non-union channels of representation are becoming more widespread.

Still, this does not (necessarily) mean the end of representation by trade unions. Tradition plays an important part, as can be seen on the one hand in the number of employers responding that they had trade union representation structures and on the other on the fact that the TUC reported more information and consultation agreements had been signed with unions in response to the new regulations. A kind of “single channel plus” system seems (at the moment) likely to evolve – trade union representation where unions are recognised supplemented by elected representatives for non-union workplaces⁴³².

While a slow and gradual movement of the British system towards a more continental style representational system not exclusively relying on trade unions thus may be detected, it still is markedly different from the German system with its strict separation between bargaining unions outside of and representing works councils, independent from unions, inside the plant.

Conclusion

The conclusion of this part will mainly deal with changes to the British system of employee representation brought about by EC law. An assessment whether a German-style system of dual-channel representation or a British-style system of single channel is preferable will be presented in the first section of Chapter V.

⁴³² Assessing the Information and Consultation of Employees Regulations, *in*: Industrial Law Journal, Vol. 34, No. 2, p. 103ff. (p. 113)

The Directives on Transfer of Undertakings and Mass Redundancies left it to the member states to determine how information and consultation was provided, as long as they would take “all measures necessary to ensure that workers are informed, consulted and in a position to intervene through their representatives in the event of collective redundancies”⁴³³. In accordance with “single channel”, the implementations by the UK assigned the right to information and consultation to recognised trade unions only⁴³⁴. The first important change in the traditional system of representation is nevertheless connected to these Directives. National legislation was changed in 1995 after the decision in *Commission v UK* so that in cases of redundancies and transfers of undertakings employers had the choice between consulting with a recognised union and elected representatives⁴³⁵. This introduced for the first time a second channel of representation equal to the trade union channel and therefore opened up the possibility of departure from traditional trade union representation⁴³⁶. However, trade unions still remained consultation partners and their role was strengthened with the 1999 Amendments to the regulations. It has also to be noted that the scope of the Mass Redundancies Directive and the Directive on Transfer of Undertakings is rather limited, so that developments in this sector might not have a great influence on the overall picture of industrial relations.

⁴³³ Joe O’Hara, *Worker Participation and Collective Bargaining in Britain and the Influence of European Law*, London 1996, p. 12.

⁴³⁴ Joe O’Hara, *Worker Participation and Collective Bargaining in Britain and the Influence of European Law*, London 1996, p. 24.

⁴³⁵ Simon Deakin, Gillian S Morris, *Labour Law*, 3rd Edition, London 2001, p. 760.
In 1999 this was amended again, so that now employers could only consult elected representatives where there was no independent union recognised, however, “the concept of alternative-channel representation” remained
(Deakin et. al. cit. opp., p. 760).

⁴³⁶ Joe O’Hara, *Worker Participation and Collective Bargaining in Britain and the Influence of European Law*, London 1996, p. 26.

Apart from the duty to consult in cases of mass redundancies and transfer of undertakings, statutory representation other than collective bargaining is also provided for with the Health and Safety (Consultation with Employees) Regulations of 1996, (in response to the ECJ ruling from June 1994⁴³⁷) and in this case the procedure is very much trade union related. If a recognised and independent union is present, it has the right to appoint a representative from among the employees; this representative then has to be consulted by the employer on health and safety issues (S.2 (6) Health and Safety at Work etc Act 1974). If no trade union is recognised, the employer is obliged to either consult with the employees directly or with elected representatives⁴³⁸. These regulations are likely to have (had) a profound impact on workers representation, since they brought a duty to consult to non-unionised workplaces and, because these consultations are a constant requirement, might be more influential in a suspected change of British representational systems than the Directives on Collective Redundancies and Transfer of Undertakings, which allow for “one-off” consultation bodies on restricted and infrequent events⁴³⁹.

The Implementation of the EWC Directive demanded election of representatives by the whole workforce, unless (in cases of statutory EWCs) all employees are represented by recognised unions⁴⁴⁰. While the regulations therefore are a departure from the tradition

⁴³⁷ Mark Hall, Assessing the Information and Consultation of Employees regulations, *in*: Industrial Law Journal, Vol. 34, No. 2, p. 103ff. (p. 106).

⁴³⁸ IDS Employment Law Supplement, Information and Consultation regulations 2004, London 2005, p. 74f.; Michael Terry, Employee Representation: Shop Stewards and the New Legal Framework, *in*: Paul Edwards (Ed.), Industrial Relations – Theory & Practice, 2nd Edition, Oxford 2003, p. 257ff. (p. 260).

⁴³⁹ Michael Terry, Systems of Collective Employee Representation in Non-Union Firms in the UK, *in*: Industrial Relations Journal, Vol. 30, No. 1, p. 16ff. (p. 20).

⁴⁴⁰ Mark Hall, Assessing the Information and Consultation of Employees Regulations, *in*: Industrial Law Journal, Vol. 34, No. 2, p. 103ff. (p. 106).

of representation by unions, it has to be kept in mind that their scope is fairly limited. Their effect on traditional national industrial relations therefore remains doubtful.

The Information and Consultation of Employees Regulations will have an effect on the development of UK industrial relations; however, it remains to be seen as to what extent. They did prompt a number of employers to introduce 'preventive' consultation measures⁴⁴¹, and they might dissemble the 'single channel'. The regulation implementing earlier Directives have always only provided for consultation rights on very limited and restricted topics and UK law now, for the first time ever, gives a right to information and consultation procedures on a wide scope of issues. It also further underlines the trend away from a voluntaristic system to a more tightly legally regulated one⁴⁴². Even though it would be possible to restrict representation under the Directive to trade unions where recognised, the fact that in 1998 75%⁴⁴³ of workplaces in the private

In the case of SNBs, a consultative committee representing all UK employees would have to nominate the members of the SNB. (Hall, cit. opp., p. 106).

⁴⁴¹ Hall mentions findings that show that "companies have increasingly been putting information and consultation arrangements in place in anticipation of the new legislation". He also reports that "data from the TUC on voluntary union recognition agreements from November 2002 to October 2003 show that 79% included information and consultation rights over a range of issues – a 'significant improvement' on the 59% which did so over the previous year" and that a survey by the Labour Research Department likewise showed a rise in information and consultation arrangements between 2002 and 2004. This survey also showed "a 'sharp increase' [in] the reported incidence of information and consultation bodies involving employees who were not union members – from 11% of responses in 2002 to 25% in 2004 and that over a quarter of these had been set up recently (in 2002 or later)".

He also argued that experience with the EWC regulations suggests that the new legislation might lead to "legislatively-prompted voluntarism".

(Mark Hall, Assessing the Information and Consultation of Employees Regulations, *in*: Industrial Law Journal, Vol. 34, No. 2, p. 103ff. (p. 120, 122).)

⁴⁴² Mark Hall, Assessing the Information and Consultation of Employees Regulations, *in*: Industrial Law Journal, Vol. 34, No. 2, p. 103ff. (p. 104f.).

⁴⁴³ Neil Milward, Alex Bryson, John Forth, All Change at Work? – British Employment Relations 1980 – 1998, as portrayed by the Workplace Industrial Relations Surveys, London 2000, p. 96, Table 45.

sector have not recognised any unions makes clear that a strict system of single channel is not workable any more. Against the background of the 1994 decision workplaces without unions will have, if procedures are triggered by employees, to provide for other, that is elected, representation structures⁴⁴⁴.

However, the regulations allow for information and consultation done by trade unions and the number have shown that trade unions are consultation and representation partners quite frequently.

Still, British unions need to become comfortable with the fact that other forms of representation are becoming more institutionalised. The TUC took first steps in that direction in 1993 in the House of Commons when it demanded a legal right to representation for employees. Preferably, of course, to be achieved by a right to recognition for trade unions; but it acknowledged that there were other forms of representation, for example works councils, and that unions would have a role in those systems as well⁴⁴⁵. Its 1995 publication *Your Voice at Work* advocated non-union election-based representation as “fall-back” where no trade unions are recognised. Even though this still regarded trade unions as the *primary* channel for representation, it didn’t see it as the *only* channel any more. However, the TUC did miss the opportunity to explore opportunities for trade union representation to be strengthened by other forms of involvement⁴⁴⁶. In 1997, it accepted that other channels of workers’

However, in the public sector only 13% of enterprises did not recognize trade unions in 1998 (Milward *et. al.*, p. 96, Table 4.5).

⁴⁴⁴ Mark Hall, Beyond Recognition? - Employee Representation and EU Law, *in*: Industrial Law Journal, Vol. 25, No. 1, p. 15ff. (p. 19).

⁴⁴⁵ Mark Hall, Beyond Recognition? - Employee Representation and EU Law, *in*: Industrial Law Journal, Vol. 25, No. 1, p. 15ff. (p. 19).

For example, unions members elected to such bodies in workplace without union recognition would have legal rights and could use their position to open doors for unions. (Hall, *cit. opp.*, p. 26).

⁴⁴⁶ Joe O’Hara, Worker Participation and Collective Bargaining in Britain and the Influence of European Law, London 1996, p. 40.

representation might exist alongside collective bargaining⁴⁴⁷ and it in fact welcomed the Directive on Information and Consultation while the Confederation of British Industry (CBI) was opposed to it, arguing that “companies need the freedom to decide how best to communicate with employees, taking into account culture structure and size. Good employee relations should be home-grown”⁴⁴⁸. The TUC pointed out the potential benefits for unions after the coming into force of the Information and Consultation Regulations in 2005:

“Information and consultation provides unions with a golden opportunity to increase their presence in workplaces, particularly those where there are union members but where the boss has until now been refusing to engage collectively with staff”⁴⁴⁹.

In fact, unions might try to exploit the new situation to their benefit. As can be taken from the comment by the CBI, employers might be opposed to the new, “foreign” forms of consultation and might prefer to use union structures instead, this could lead to an increase in recognition; however, it will not lead to a return to single channel due to the low union-density and recognition numbers (see Graph II and III). Additionally, as the German example shows, unions can try and use the new channels to exert influence on the workplace and thus strengthen their position. But, even though comparison to the German system of dual-channel representation is made quite frequently, it has also been

⁴⁴⁷ Statutory Trade Union Recognition Joint Statement by TUC and CBI, December 1997, para 8, <http://www.publications.parliament.uk/pa/cm199798/cmselect/cmtrdind/980/8072108.htm>, last accessed 5th December 2005.

⁴⁴⁸ David Plitt, *Employee Representation, Information and Consultation in the United Kingdom*, Köln 2002, p. 126f.

However, in the key objectives set out by the TUC at its annual conference in Blackpool in September 2002 it argued for preference of trade union representatives over elected representatives for information and consultation in the implementation of the Directive (Plitt, *opp. cit.*, p. 128,)

⁴⁴⁹ Trade Union Congress, *New Information and Consultation Rights should mean no more ‘bolts from the blue’*, <http://www.tuc.org.uk/law/tuc-9643-f0.cfm>, last accessed April 19th, 2006.

pointed out that conditions in Germany are fairly different. Collective bargaining there is mainly undertaken at sectoral or regional, not at shop-floor level; thus the works council, operating mainly at shop-floor level, will not compete with trade unions and eventual system of representation by collective bargaining. In the UK, on the other hand, representation is mainly undertaken by collective bargaining at shop-floor level, thus trade unions fear competition from works councils and are eager to defend their monopoly of representation⁴⁵⁰. The Draft Implementation report of the Directive states that

“for British trade unions, in fact, the right to information and consultation is essentially a trade union right. The existence of this right under the Directive, or recognition that it is the right of another, (elected) representative body, would encourage employers not to organise. This might, moreover, reduce the unions' field of action to mere consultation and could be used by less scrupulous employers as a means of circumventing the law on trade union representation⁴⁵¹.”

However, regardless of the voluntaristic tradition, the TUC had welcomed the draft Directive on Information and Consultation in November 1998, while Government and CBI were opposed. TUC general secretary Monks said:

“I have never understood while the British government is so opposed to such a measure. It simply requires all companies to do what successful ones already so – tell staff what is going on and listen what they have to say”⁴⁵².

⁴⁵⁰ Paul Davies, Claire Kilpatrick, UK Worker Representation After Single Channel, *in*: Industrial Law Journal, Vol. 33, No. 2, p. 121ff. (p. 121f.); Hugh Collins, K. D. Ewing, Aileen McColgan, Labour Law – Text and Materials, Oxford 2001, p. 868; see Michael terry, Partnership and the Future of Trade Unions in the UK, *in*: Economic and Industrial Democracy, Vol. 24, N0. 4, p. 485ff. (p. 498).

⁴⁵¹ Isabelle Schönmann, Stefan Clauwaert, Wiebke Warneck, Information and Consultation in the European Community, Implementation Report of Directive 2002/14/EC (Draft Report), Brussels 2005, p. 20. Works councils will, after all, represent every worker in the plant, regardless of union membership. Thus there might be less incentive to join a union.

⁴⁵² European Industrial Relations Observatory, UK Reactions to Draft EU Consultation Directive,

<http://www.eiro.eurofound.eu.int/1998/11/inbrief/uk9811162n.html>, last accessed December 22nd, 2005.

Chapter III

The first two Chapters have provided an historical and systematical background to the two systems of industrial relations. This chapter will point out the core differences between them, so that in subsequent chapter a comparison and evaluation can be tried.

Voluntarism and Legalism

British industrial relations have developed on the basis of a concept of voluntarism (a key feature of the common law system), whereas Germany's highly regulated system of industrial relations adheres to the principles of legalism⁴⁵³.

This difference has its reason in history. Britain the first country to be industrialised and

⁴⁵³ Jürgen Hoffmann, *Industrial Relations and Trade Unions in Germany: The Pressure of Modernisation and Globalisation*, in: Jeremy Waddington, Reiner Hoffmann (Ed.) *Trade Unions in Europe – Facing Challenges and searching for Solutions*, Brussels 2000, p. 249ff. (p. 250); Heinz Tüselmann, Arne Heise, *The German Model of Industrial Relations at the Crossroads: Past, Present and Future*, in: *Industrial Relations Journal*, Vol. 31, No. 3, p. 162ff. (p. 163).
While collective bargaining itself is subject to comparably little detailed legislation in Germany (Tüselmann et. al. cit. opp., p. 164), the central goal of the British TUC in the late 1940s, despite the tradition of voluntarism, was a system of state economic policy of demand management that would prevent unemployment. However, full autonomy in collective bargaining was to be maintained (Andrei S. Markovits, Christopher S. Allan, *Trade Unions and the Economic Crisis: The West German Case*, in: Peter Gourevitch et. al., *Unions and Economic Crisis: Britain, West Germany and Sweden*, Boston and Sydney 1984, p. 26).

However, it should be noted that since the 1960s the law has come to play an ever greater role in British industrial relations. Even after the repeal of the Industrial Relations Act 1971, quite a few legal regulations remain. The law provides for machinery to assist with collective bargaining by facilitating recognition claims or obtaining information for collective bargaining from the employer. Comparability claims are possible and employers are obliged to consult with trade unions over redundancies. To make use of this rights, trade unions have to be certified “independent” - another step of the law into the sphere of unions.

(Karl Mackie, *Industrial Relations Law Commentary*, in: *Industrial Relations Journal*, Vol. 10, No. 4, p. 57ff. (p. 60).)

industrialisation met a well prepared-workforce⁴⁵⁴. The slow commercialisation of the crafts, taking about 200 years, had meant that the organs and fighting means of collective interest representation were established before the rapid process of industrialisation started. A synthesis of effective social security, fighting strength and work place control of unions already existed and allowed British unions to rely on their own strength rather than the legislature. Due to the different historical development, this advantage could not be reproduced on the continent⁴⁵⁵. Also, the British workers' movement was a wholly industrial movement, acquiring industrial before political power and making pragmatic rather than ideological demands. It had no political arm, so no demands for collective rights could be made; unions thus relied on their own strength rather than the law⁴⁵⁶. Finally, long experience taught unions to fear intervention by the courts⁴⁵⁷, thus preferring immunities to positive rights.

For employers, the system of voluntarism and the connected legal immunities of unions

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- ⁴⁵⁴ Especially the new model unions, who organised highly qualified members and had strict requirements for entry, provided a densely spun web of union activities; they not only offered insurance but were also able to control the local labour market by means of job agencies, as well as the process of production, mostly by rigidly sticking to the traditional standards of the trade. (Friedhelm Boll, *Arbeitskämpfe und Gewerkschaften in Deutschland, England und Frankreich*, Kassel 1992, p. 136f, 138f.
- ⁴⁵⁵ Friedhelm Boll, *Arbeitskämpfe und Gewerkschaften in Deutschland, England und Frankreich*, Kassel 1992, p. 136f, 138f; Stephen Bornstein, Peter Gourevitch, *Unions in Declining Economy: The Case of the British TUC*, in: Peter Gourevitch et. al. *Unions and Economic Crisis: Britain, West Germany and Sweden*, Boston and Sydney 1984, p. 27.
- ⁴⁵⁶ Lord Wedderburn of Charlton, *Industrial Relations and the Courts*, in: *The Industrial Law Journal*, Vol. 9, No. 2, p. 65ff. (p. 71f.); Bryn Perrins, *Trade Union Law*, London 1985, p. 30.
- ⁴⁵⁷ This distrust is still found today and might have its reason in the "class distinction" between workers and judges. The "class instincts" of judges are believed to prejudice them against union and working class objectives and indeed, there has been a tendency for judges to decide against unions in judgements regarding trade unions effectiveness (*Taff Vale, Osborne and Rookes v Barnard*). (Karl Mackie, *Industrial Relations Law Commentary*, in: *Industrial Relations Journal*, Vol. 10, No. 4, p. 57ff. (p. 61); Roger Welch, *Judges and the Law in British Industrial Relations: Towards a European Right to Strike*, *Social & Legal Studies*, Vol. 4, p. 174ff. (p. 180f.)).

had the advantage that these gave no base for a challenge to the manager's right to manage, they thus were perceived as a lesser evil than giving unions positive rights under the law⁴⁵⁸.

However, voluntarism has been seriously impeded by national and European developments.

Some of the European developments (growing European legislation in the field of industrial relations, the UK's opt-in to the Maastricht social chapter, and the ECJ's decision in June 1994) have been detailed above. On national level, the erosion of voluntarism has started in the mid-1960s with *Rookes v Barnard*⁴⁵⁹. The Thatcher administration led the British system of industrial relations to be one of the most tightly regulated in Europe (see Chapter I). Traditionally, industrial relations in the UK had, for the greater part, relied on a system of "immunities" that denied courts jurisdiction over certain areas. This stands in stark contrast to the development in most other European countries, where trade unions and their activities gained - to a greater or lesser extent - protection by positive rights⁴⁶⁰. The system of immunities had the effect that, legally,

"while workers became free to organise collectively, the employer was equally free to dismiss those who joined a union; while unions were entitled to bargain collectively, employers were equally at liberty to refuse to negotiate or recognize a union, whatever its level of membership; and while a union could lawfully call a strike 'in contemplation or furtherance of a trade dispute', individual strikers were

⁴⁵⁸ Joe England, Brian Weekes, Trade Unions and the State: a Review of the Crisis, *in*: Industrial Law Journal, Vol.12, No. 1, p. 11ff. (p. 12, 13).

⁴⁵⁹ Roger Welch, Judges and the law in British Industrial Relations: Towards a European Right to Strike, *in*: Social & Legal Studies, Vol. 4 (1995), p. 175ff. (p. 179).

⁴⁶⁰ Richard Hyman, Understanding European Trade Unionism - Between Market, Class & Society, London 2001, p. 69.

still in breach of their contracts of employment and might therefore be summarily dismissed (or even sued for damages)”⁴⁶¹.

In practice, however, things were often different. As long as employees were in a favourable economical position and trade unionism was strong, employers usually tended to not take advantage of their legal freedoms⁴⁶².

Thatcher introduced numerous legal obligations on trade unions and narrowed the scope for industrial action. At the same time she restricted unions’ immunities⁴⁶³. Labour, anxious to not appear too union-friendly and operating under much the same economical environment, continued the cutback on voluntarism after its return to power in 1997. It ended the opt-out from the social chapter of the Maastricht treaty, thus laying the ground for more legal regulation of the employment relationship coming from the EU. The introduction of statutory recognition and especially the statutory minimum wage in 1999 marked another step away from the tradition of state-abstinence from collective bargaining⁴⁶⁴.

Due to changes in the labour market – high unemployment, job insecurity, and decline in jobs with a tradition of unionisation – and resulting losses of union power, union began to see statutory rights in a different light. A symbolic change occurred when in 1986 the TUC, that until then had always resisted such an intrusion into collective bargaining, accepted the idea of a statutory minimum wage. Two years later, it started

⁴⁶¹ Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p. 69.

⁴⁶² Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p. 70.

⁴⁶³ Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p. 104.

⁴⁶⁴ Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p. 106f.

advocating British membership of the EU and soon the adoption of the main provisions of the European social model was high on the agenda of most British unions. In 1994, the TUC realised that a strict model of “single channel” representation was not sustainable any longer accepted that also non-union employees should be entitled to representational structures⁴⁶⁵.

There were internal influences, too– feminists had criticised that “free collective bargaining” did little to overcome sex discrimination, thus advocating legislation in this field. The failed Industrial Relations Act 1971 introduced statutory recognition procedures and unfair dismissal legislation for the first time and unions soon adopted the position that such rights should be strengthened rather than abolished (indeed, the 1974 Act provided for more extensive rights than ever before)⁴⁶⁶.

However, while voluntarism has been restrained, some important effects are still distinctive to the British system and there still is a suspicion of a legal framework by unions as well as employers.

One of the more obvious effects of voluntarism is that collective agreements are not legally binding in the UK, whereas the normative effect is provided for by law in Germany (§ 4 I TVG)⁴⁶⁷. However, also the German system allows employer and employee to individually agree on different terms if either they are more favourable for the employee (*Günstigkeitsprinzip*) or the agreement allows for variations

⁴⁶⁵ Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p. 108f.

⁴⁶⁶ Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p. 108f.

⁴⁶⁷ Manfred Löwisch, *Arbeitsrecht*, 7th Edition, Düsseldorf 2004, p. 88, Rn. 294.

The legally binding effect occurs between the *beiderseits Tarifgebundenen*, that is, the members of the partners to the agreement (employers' association and unions). The employer can be partner either as a member of an employers' association or by being partner to an agreement himself (§ 3 I TVG).

(*Öffnungsklausel*), § 4 III TVG⁴⁶⁸.

Non-enforceable collective agreements are generally favoured by both UK employers and unions. Binding agreements are avoided because of the bilateral obligations they would bring; the regulations of collective agreements are therefore incorporated into individual contracts. Standing outside a legally enforceable structure may reduce rights, but it also avoids all obligations, thus producing flexibility for the unions concerned⁴⁶⁹.

Wages and Incomes Policies

Policies of wage restraint, expected in a legalistic rather than a voluntaristic system, have been discussed in Germany only for a short time in connection with the economic crisis of the late 1960s. They were, however, an important issue in the UK from the end of WW II until the 1970s.

There are several factors that may help explaining this. The economic situation in both countries will be taken into consideration as will the system of company bargaining that developed in the UK during the 1950s and 1960s.

The Economic Situation

Wage restraints in the UK were usually justified by reference to rising inflation, thought to be worsened by wage increases above the level of productivity.

In the 1950s, inflation in the UK has been considerably higher than in Germany⁴⁷⁰.

⁴⁶⁸ Manfred Löwisch, *Arbeitsrecht*, 7th Edition, Düsseldorf 2004, p. 88f., Rn. 295, 297, *Günstigkeitsprinzip* may be translated as 'favourability principle'; *Öffnungsklausel* as 'opening' or 'opt-out clause'.

⁴⁶⁹ Philip Kolvin, *Collective Bargaining – Don't Cry for me Tina Lea*, in: *Current Law Week*, 2000 8(8), F1 – F2.

⁴⁷⁰ The British Retail Price Index (RPI) rose from the base value of 100.00 in January 1962 to 191.8 in January 1974, with an especially high rise from 159.0 to 188.2 between 1971 and 1973. In relative terms, inflation was 9.5% in 1951, but only 0.9% in 1959. In the 1960s inflation generally was at or (just) below 5%, with only in 1969 a level of 5.6%. However, in the early 1970s inflation went up to

There, the average yearly rise in monthly gross wages for manual workers in manufacturing was 6.9%⁴⁷¹. In the UK, average weekly earnings between 1955 and 1960 for the same group of workers rose with an average of 5.46%⁴⁷².

While the German economy experienced higher average wage rises, productivity usually kept up⁴⁷³, thus higher wages had no great effect on inflation. Real gross wages increased by 26.5% between 1951 and 1994, but productivity (real GNP per employed

17.2% in 1974 and stayed at a high level during the following years. However, one has to be careful in interpreting this data as an indicator for the effectiveness of wage restraints in fighting inflation – after all, the oil crisis of 1974 fell into this period which accounted for greater inflation worldwide (see Table on Global Inflation 1870 – 1998, <http://www.sfm.vwl.uni-muenchen.de/heinemann/geldpolitik/geldpolitik-einfuehrung.pdf>, last accessed November 2nd, 2005).

Germany experienced inflation on a smaller scale with a peak of about 3.7% in 1966. From that level it fell to 1.9% at the end of the decade. The 1970s witnessed greater inflation in Germany as well, although on a much smaller scale as in Great Britain. Prices rose by 5.1% in 1971, with the highest rise being 7% in 1974.

(Data from: Retail Price Index, all items, Office for National Statistics, issued September 2005; Robert Twigger, Inflation: The Value of the Pound 1750 – 1998, House of Commons Library, Research Paper 99/20, Table 1 ; <http://www.sfm.vwl.uni-muenchen.de/heinemann/geldpolitik/geldpolitik-einfuehrung.pdf>, last accessed October 18th, 2005.)

⁴⁷¹ Statistisches Bundesamt Deutschland, Durchschnittliche Bruttomonatsverdienste der Arbeiter/-innen im Produzierenden Gewerbe, <http://www.destatis.de/indicators/d/Irver03jd.htm>, last accessed April 24th, 2006

Rises varied from 12.5% in 1951 to 2.3% in 1954. The highest yearly figure are to be found at the beginning of the decade but the average figure for the years 1955 to 1960 taken separately is 6.6% (Statistisches Bundesamt, cit. opp.)

⁴⁷² Guy Routh, Occupation and Pay in Great Britain 1906 – 1960, Cambridge 1965, p. 128.

According to the Liesner Index, the biggest wage rises occurred after ca 1975 (and also after the end of incomes policy), however, wages then kept more or less in line with prices. (http://www.statistics.gov.uk/articles/labour_market_trends/century_labour_market_change_mar2003.pdf, last accessed November 2nd, 2005.)

⁴⁷³ Andrei S. Markovits, Christopher S. Allan, Trade Unions and the Economic Crisis: The West German Case, in: Peter Gourevitch et. al., Unions and Economic Crisis: Britain, West Germany and Sweden, Boston 1984, p. 104f.

When productivity was left behind by wages, cost-push inflation of 2.3 and 4% appeared in Germany between 1961 and 1962 (Markovits et. al., cit opp. p. 105)

person) rose by 25.2%⁴⁷⁴. In the UK, however, the GDP grew with 1.0% in 1955-57 and with 2.2% in 1957-63⁴⁷⁵, thus wage rises outstripped productivity.

Additionally, the British economy was weaker than that of her competitors (linked to “stop-go” cycles, a poor investment record and “unscientific management”) while workers had grown used to wage increases during the 1960s. This combination soon led to calls for wage restraints by government⁴⁷⁶.

Of note here is whether and to what extent the specific British system of industrial relations played a part.

First, the UK experienced a period of full employment until about 1965, which enhanced unions' bargaining power and led to bigger wage claims. However, also Germany had full employment between about 1956 and ca. 1966, so this can only be part of the reason⁴⁷⁷.

⁴⁷⁴ Andrei S. Markovits, Christopher S. Allan, Trade Unions and the Economic Crisis: The West German Case, *in*: Peter Gourevitch at. al., Unions and Economic Crisis: Britain, West Germany and Sweden, Boston 1984, p. 102.

Reduction in working time during the 1950s limited the rises in productivity so that West-German productivity was generally below the OECD average in the mid 1950s; but since this was mostly a result of cheap labour being readily available up to that time, productivity kept up with wages. (Markovits et. al., cit. opp. p. 104).

⁴⁷⁵ http://www.foe.co.uk/resource/briefings/more_isnt_better.pdf, last accessed November 2nd, 2005.

The difference between GDP and GNP is that GDP measures all production within a given country, while GNP measures the production of citizens of that country, wherever they happen to be working (<http://www.moneychimp.com/glossary/gnp.htm>, last accessed November 2nd, 2005).

In general, GDP per capita in the UK has risen less fast than in Germany. The UK experienced a fourfold rise over the course of the 20th century, whereas the rise in Germany was 5.5 times. (<http://www.parliament.uk/commons/lib/research/rp99/rp99-111.pdf>, last accessed November 2nd, 2005).

⁴⁷⁶ Richard Hyman, Understanding European Trade Unionism – Between Market, Class & Society, London 2001, p. 98.

⁴⁷⁷ Andrei S. Markovits, Christopher S. Allan, Trade Unions and the Economic Crisis: The West German Case, *in*: Peter Gourevitch at. al., Unions and Economic Crisis: Britain, West Germany and Sweden, Boston 1984, p. 102.

A reason for wage rises keeping in line with productivity might be that German unions enjoyed more rights and protection by law than ever before and were afraid of endangering these freedoms

Secondly, collective agreements are not legally binding in the UK and there exists no *Friedenspflicht*⁴⁷⁸. This may lead to more frequent wage claims and, especially when labour is scarce, to more frequent wage rises. Frequent wage claims may also result in more frequent disruptions in forms of strikes, stoppages etc. In fact, there has been more strike activity and days lost through strikes in Britain than in Germany⁴⁷⁹.

The system of voluntarism and the ensuing disruptions might thus be a decisive factor in the less favourable development of the British economy after the war, whereas industrial peace during the validity of an agreement might have had a positive influence on the economical development in Germany. After all, wage rates and other important conditions of employment will be fixed for some time and can therefore be “planned

by antagonizing the Government (Markovits et. al., cit. opp., p. 111). Additionally, memories of Weimar and the Third Reich helped ensure that the unions stood firmly on the grounds of the new market economy, even though the political context was not always favourable to them (Johan Verberckmoes, Germany, Inner Trade Union Diversity, in: Patrick Pasture, Johan Verberckmoes, Hand De Witte (Ed.), *The Lost Perspective? Volume 1*, Aldershot 1996, p. 180f.). However, Viktor Agartz presented his theory of “*expansive Lohnpolitik*” (expansive wagepolicy) at the DGB Conference in 1954, claiming that wage policy needs to be expansive in order to strengthen the potential of buyers (*Kaufkraft*) and thus stimulate production. His speech influenced the rather radical *Frankfurter Beschlüsse* – however, those did not have much success and wages therefore kept in line with productivity.

(“Lohnpolitik muss auch expansiv sein...”J. Viktor Agartz (1897 bis 1964) und die sozialistische Linke; Teil: Den Charakter des Unternehmens ändert die Mitbestimmung nicht, in: *Junge Welt*, 9. 12. 2004).

In Great Britain, on the other hand, unions used their greater bargaining power gained by full employment. They went on strike more often and restrictive practises such as manning regulations, demarcation rules, work pacing, go-slows, closed shops etc. were more widely used.

(Derek H. Aldcroft, Michael J. Oliver, *Trade Unions and the Economy: 1870 – 2000*, Aldershot 2000, p. 91f.)

⁴⁷⁸ ‘Peace duty’: the obligation to abstain from industrial action during the duration of a collective agreement.

⁴⁷⁹ Derek H. Aldcroft, Michael J. Oliver, *Trade unions and the Economy: 1870 – 2000*, Aldershot 2000, p. 98f.

around⁴⁸⁰, so that wage restraints are less necessary.

Company Bargaining

The different economic development in both countries might also have been influenced by the specific British system of company bargaining, facilitated by the system of shop stewards. While the German equivalent to the shop steward, the *gewerkschaftlicher Vertrauensmann*⁴⁸¹, has a very limited role and basically just provides a link between union and members on the shop floor, the British shop steward plays a much more extensive part. He not only acts as a communicator between unions and members but also as a negotiator between workers and management and is in that position able to negotiate agreements at plant level, while negotiations in Germany are predominantly

⁴⁸⁰ See: Derek H. Aldcroft, Michael J. Oliver, *Trade Unions and the Economy: 1870 – 2000*, Aldershot 2000, p. 99; Jürgen Hoffmann, *Industrial Relations and Trade Unions in Germany: The Pressure of Modernisation and Globalisation*, in: Jeremy Waddington, Reiner Hoffmann (Ed.) *Trade Unions in Europe – Facing Challenges and Searching for Solutions*, Brussels 2000, p. 249ff. (p. 252).

⁴⁸¹ *Vertrauensleute*, although elected or ratified by union members as well, tend to rather represent the union and all members in general than just those who voted for them, which may partly be due to the stronger position of the work councils. They also seem to see themselves rather as a link between union and workplace, providing information about events at the shop to the unions and information and advice about the union, their rights and responsibilities to the members. They may have rights in connection with collective bargaining as well, differing from union to union; for example, the *Vertrauensleute* of the Chemical Workers' Union elect and pass recommendations to the bargaining committees, which carry out negotiations with the employers' federation and are responsible for the collective agreements. However, these rights are small in comparison with the full bargaining carried out by shop stewards and a study by Ebsworth concluded that *Vertrauensleute* “are not important in workplace industrial relations”. (David Ebsworth, *Lay Officers in the German Chemical Workers' Union: a Case Study*, in: *Industrial Relations Journal*, Vol. 11, No. 4, p. 63ff. (p. 64f., 67, 68).)

Furthermore, most day-to-day issues like grievances are handled by the works councils, which are allowed to negotiate at plant level, but only on issues not generally covered by collective agreement (§ 87 I BetrVG).

(Thomas Klikauer, *Trade Union Shopfloor Representation in Germany*, in: *Industrial Relations Journal*, Vol. 35, No. 1, p. 2ff. (p. 2)).

undertaken at regional or national level. During times of full employment with managers eager to keep their work force, stewards often succeeded in negotiating huge wage rises to an extent that the national agreement came to be seen only as the provider of a form of minimum wage⁴⁸², facilitated by its non-binding nature⁴⁸³.

Other factors facilitated the shift, too⁴⁸⁴. British joint consultative machinery,

⁴⁸² Hugh Armstrong Clegg, *The Changing System of Industrial Relations in Great Britain*, Oxford 1979, p. 13; Derek H. Aldcroft, Michael J. Oliver, *Trade Unions and the Economy: 1870 – 2000*, Aldershot 2000, p. 115.

Full employment was one reason for the rise in power of shop stewards; another was that union leaders and management relinquished much of their control of the situation (Aldcroft et. al., cit. opp., p. 117).

The Report of the Donovan Commission considered full employment as a key feature in the decentralisation of collective bargaining: “Full employment encourages bargaining about pay at the factory and workshop level. Because they cannot easily be replaced, the bargaining power of individuals and groups of workers is increased; and because their employer is anxious to keep them, and perhaps to recruit new workers, he might be willing to ‘bid up’ their without much prompting” (Royal Commission on Trade Unions and Employers, London 1968, p. 20, para 74).

“The idea that shop stewards have taken advantage of market forces to push domestic wages to levels above that attainable through national agreements had received empirical backing from a number of studies” (Esmond Lindop, *Workplace Bargaining – the End of an Era?*, in: *Industrial Relations Journal*, Vol. 10, No. 1, p. 12ff. (p. 12).) Lindop consequently also claims a revival of national bargaining by rising unemployment since 1968 (p. 17).

Furthermore, workplace organization is strengthened by labour shortage so that national agreements are in danger of not being observed if unions do not take “extreme care to secure the consent of the rank and file”.

(Alan Fox, *History and Heritage – The Social Origins of the British Industrial Relations System*, Boston and Sydney 1985, p. 291.)

Even though full employment cannot fully account for the rise of shop floor bargaining – after all, there was full employment in Germany as well but no rise in or shift to shop floor bargaining – it still has been crucial.

(J.F.B. Goodman, T.G. Whittingham, *Shop Stewards*, London 1973, p. 158ff.).

⁴⁸³ J.F.B. Goodman, T.G. Whittingham, *Shop Stewards*, London 1973, p. 158ff; Stephen Bornstein, Peter Gourevitch, *Unions in a Declining Economy: The Case of the British TUC*, in: Peter Gourevitch et. al., *Unions and Economic Crisis: Britain, West Germany and Sweden*, Boston and Sydney 1984, p. 27.

Since fixed-terms agreements that restrict claims for several years, started to become more common on national level, the focus of bargaining shifted towards the shop-floor level where there was still

established during and after World War II, was used for negotiations (although expressively forbidden) and some managers had a preference for dealing with shop stewards rather than union officials⁴⁸⁵. Also, a decline in manual employment since the 1930s has meant that the sector traditionally covered by long-established, industry-wide agreements has grown smaller; generally, industry-wide agreements have often involved older and declining industries such as textiles, railways or shipbuilding⁴⁸⁶. Additionally,

the chance to negotiate some improvements. (J.F.B. Goodman, T.G. Whittingham, *Shop Stewards*, London 1973, p. 158ff.)

The main focus of shop floor bargaining seems to be job-related issues like overtime, dismissal, discipline and redundancy. Contracting out, allocation of work and demarcation were also widely negotiated.

There appears also to be a correlation between size of plant and occurrence of workplace bargaining with more issues negotiated locally in bigger plants. (John Storey, *Workplace Collective Bargaining and Managerial Prerogatives*, in: *Industrial Relations Journal*, Vol. 7 No. 3, p. 40ff. (p. 51, 53).

⁴⁸⁴ There is, however, an article suggesting that the shift has been everything else but complete and that national bargaining is still “alive and well”; also suggesting a move back to national bargaining in economical more adverse conditions: “While, during times of economic expansion, workers at each plant and different groups within each plant can pursue their interests through fragmented workplace bargaining, during a recession, the need for mutual support and the security offered by company-wide pay structures becomes more important”.

(Esmond Lindop, *Workplace Bargaining – the End of an Era?*, in: *Industrial Relations Journal*, Vol. 10, No. 1, p. 12ff. (p. 14, 17).)

Unions also haven't always been in favour of domestic bargaining for fear that the security provided by national agreements in terms of minimum pay would be endangered. Also, the claim for the (national) rate for the job has been “a rallying call for a century”. However, in economical favourable times they were happy to take advantage of domestic bargaining.

(Michael P. Jackson, John W. Leopold, Kate Tuck, *Decentralisation of Collective Bargaining – An Analysis of Recent Experience in the UK*, London 1993, p. 24f.)

⁴⁸⁵ J.F.B. Goodman, T.G. Whittingham, *Shop Stewards*, London 1973, p. 158ff.

One reason for this is that management and shop stewards both thought it prudent to solve a problem as low as possible, some of them would also see it as defeat to call somebody in from the outside. Additionally, stewards are closer to the firm and its problems and have closer contact to the workforce.

⁴⁸⁶ Esmond Lindop, *Workplace Bargaining – the End of an Era?*, in: *Industrial Relations Journal*, Vol. 10, No. 1, p. 12ff. (p. 13).

Furthermore, it is not believed that national bargaining structure will develop to set nationally negotiated terms for new industries such as electronics or service sector.

British incomes policies, detailed in Chapter I, might have played a part since agreements on plant and company level are less easily controllable; sometimes incomes policies have actually fostered workplace bargaining by “special provisions (like productivity deals in the 1960s) more easily taken advantage of at company level”⁴⁸⁷. Moreover, “with work-place bargaining trade unions are denied an influence in broad company policy”, thus making it more attractive to employers. Finally, history may have played its part with a tradition of craft unionism and employer disunity⁴⁸⁸.

The shift in the level of bargaining had the effect that management and national union leaders had less control over matters such as production process, work methods and pay than their counterparts in Germany⁴⁸⁹. This made it more difficult for managers and union leaders to gain the workers' support for implementing measures that might raise productivity – in fact, the system of shop stewards and workshop organisation tended to “reinforce the perpetuation of restrictive practises”. Plant bargaining by shop stewards “involved a continuous process of negotiation and accommodation between workers, shop stewards and low level management, scarcely a recipe for efficient industrial relations”. The results often were wage drift, unofficial stoppages and wildcat strikes⁴⁹⁰.

⁴⁸⁷ Esmond Lindop, Workplace Bargaining – the End of an Era?, *in*: Industrial Relations Journal, Vol. 10, No. 1, p. 12ff. (p. 13).

Systems like pay-by-result might also have been used to disguise pay developments at workplace level.

⁴⁸⁸ William Brown, Keith Sisson, Industrial Relations in the Next Decade - Current Trends and Future Possibilities, *in*: Industrial Relations Journal, Vol. 14, No. 1, p. 9ff. (p. 11, 20).

⁴⁸⁹ Derek H. Aldcroft, Michael J. Oliver, Trade Unions and the Economy: 1870 – 2000, Aldershot 2000, p. 115., 117.

⁴⁹⁰ Derek H. Aldcroft, Michael J. Oliver, Trade Unions and the Economy: 1870 – 2000, Aldershot 2000, p. 115, 117.

In some cases, every little change to work practices or job specifications had to be negotiated with the stewards, and their approval was often only secured after a new rate for the job was agreed upon. (Aldcroft et.al, cit. opp. p. 118).

Even though there has been full employment in Germany as well, it didn't result in a shift to company bargaining. German collective agreements have legal force, and even though it is possible to agree on more favourable terms locally this is rarely done⁴⁹¹. Also, bargaining there is carried out mainly at national or regional level by powerful central unions (reasons for this are to be found in the rebuilding of German unions along industrial lines after WW II, detailed in Chapter I), while the works council is only allowed to deal with issues provided for by law. It is prevented from negotiating on pay and *Vertrauensleute* do not engage in bargaining⁴⁹². The dominant type of agreement therefore is the *Flächentarifvertrag*⁴⁹³. The *Friedenspflicht* and the fact that the works council is restricted by the rights given to it by law and prohibited from taking industrial action provided for more peaceful industrial relations. Local management therefore retained more control⁴⁹⁴.

⁴⁹¹ Manfred Löwisch, *Arbeitsrecht*, 7th Edition, Düsseldorf 2004, p. 85, Rn 284.

In 2001, 44.6% of western German companies and 63.1% of western German employees were bound by sectoral agreements, while only 2.9% of those companies and 7.6% of the employees were bound by company agreements (http://www.boeckler.de/cps/rde/xchg/SID-3D0AB75D-68237243/hbs/hs.xsl/564_21316.html, last accessed November 1st, 2005).

⁴⁹² Derek H. Aldcroft, Michael J. Oliver, *Trade Unions and the Economy: 1870 – 2000*, Aldershot 2000, p. 117., 119.

Additionally, German bargaining does not only take place on a regional scale, results achieved by one union (notably IG Metall) are often taken as guidelines by other unions, thus further standardising conditions (Heinz Tüselmann, Arne Heise, *The German Model of Industrial Relations at the Crossroads: Past, Present and Future*, in: *Industrial Relations Journal*, Vol. 31, No. 3, p. 162ff. (p. 164); Richard Hyman, *Understanding European Trade Unionism – Between Market, Class & Society*, London 2001, p. 121).

⁴⁹³ Agreements that have been concluded between a union and an employers' organisation on regional or national level.

<http://www.boeckler.de/pdf/ta-flaechentarifvertrag.pdf>, last accessed November 1st, 2005.

⁴⁹⁴ Derek H. Aldcroft, Michael J. Oliver, *Trade Unions and the Economy: 1870 – 2000*, Aldershot 2000, p. 117., 119.

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It is therefore likely that the system of shop stewards and company bargaining, as it developed in Britain, had a negative influence on the economy. Not only did it lead to frequent interruptions, also, if collective agreements are conducted at a broader, e.g. national, level, it is easier to consider the effects on the economy as a whole⁴⁹⁵, whereas shop floor negotiations may take only the company in question in regard.

Multi-Unionism

Another difference lies in the number of unions. In 2002, there were 213 unions in the UK⁴⁹⁶, but only eight affiliated to the DGB⁴⁹⁷.

Reasons again may lay in history. In Nazi-Germany, trade unionism was brutally suppressed and unions liquidated. After 1945, therefore, the trade union movement had to be rebuild from scratch. Importance was attached to restructuring along industrial rather than partisan lines in order to avoid the ideological divisions and industrial

the Crossroads: Past, Present and Future, *in*: Industrial Relations Journal, Vol. 31, No. 3, p. 162ff. (p. 164); Richard Hyman, Understanding European Trade Unionism – Between Market, Class & Society, London 2001, p. 121).

⁴⁹⁵ The fact that German agreements are characterized by leading settlements in the engineering sector which then spread across the whole economy provides for an inherent wage restraint since the negotiators in the engineering sector, IG Metall and the employers' association Gesamtmetall, have to conclude agreements that do not endanger German competitiveness. Therefore, they have to consider the current rate of inflation and economy wide productivity growth and, since productivity growth in manufacturing is generally higher than economy-wide, have to restrain their claims. (Heinz Tüselmann, Arne Heise, The German Model of Industrial Relations at the Crossroads: Past, Present and Future, *in*: Industrial Relations Journal, Vol. 31, No. 3, p. 162ff. (p. 164).)

⁴⁹⁶ Department of Trade and Industry, <http://www.dti.gov.uk/files/file12479.pdf>, last accessed January 16th, 2006

⁴⁹⁷ There are some 76 non-affiliated unions; however, they are generally of not much importance and therefore will not be considered here.

competition of the Weimar time⁴⁹⁸. Additionally, the allied forces in some cases initially permitted only one union per industry⁴⁹⁹ (for a more detailed account see Chapter I).

Workplace structure is also important. If boundaries are clear and difficult to cross between different groups, distinctive group identities and specific interest groups, e.g. unions, will develop. German inter-occupational boundaries are less rigid than British, training involves rotation and trades are less specified in terms of production or maintenance. This might not only be a factor in explaining the prevalence of industrial unionism, it also seems to encourage a greater concentration on the (factory based) works council, since the point of reference for a German worker is the factory rather than the job description⁵⁰⁰. Also, works councils represent the entire workforce, blue-

⁴⁹⁸ Andrei S. Markovits, Christopher S. Allan, Trade Unions and the Economic Crisis: The West German Case, in: Peter Gourevitch et al., Unions and Economic Crisis: Britain, West Germany and Sweden, Boston and Sydney 1984, p. 94

“Unionists who cooperated in the Resistance agreed that their past division had eased the way for Hitler’s rise and that they establish a unified organization observing strict religious and political neutrality.”

(William L. Patch, jr., Christian Trade Unions in the Weimar Republic 1918-1933 – The Failure of “Corporate Pluralism”, London 1985, p. 233).

However, even though the sharp ideological division were at first avoided (the intention was for the whole working class “to join together in a united movement ‘democratic in character and independent of employers, government, denomination or party’”), there was soon to be competition for the DGB and its industrial unions: in 1949 a separate organisation for salaried employees was founded (DAG – *Deutsche Angestellten Gewerkschaft*, now merged with other unions into ver.di and part of the DGB). Other organisations for permanent civil servants are the *Deutscher Beamtenbund* and the *Christlicher Gewerkschaftsbund* (Christian Trade Union Federation), established in 1955.

(Helga Grebing, History of the German Labour Movement – A Survey, Leamington Spa, 1985, p. 174).

⁴⁹⁹ Wolfgang Streek, Peter Seglow, Pat Wallace, Competition and Monopoly in Interest Representation: A Comparative Analysis of Trade Union Structure in the Railway Industries of Great Britain and West Germany, in: Organization Studies Vol. 2, Issue 4, p. 307ff (p. 320)
For example for the case of railways and the GdED (*Gewerkschaft der Eisenbahner Deutschlands*) (Streek et al., cit. opp., p. 320).

⁵⁰⁰ Malcolm Warner, Arndt Sorge, The Context of Industrial Relations in Great Britain and West Germany, in: Industrial Relations Journal, Vol. 11, No 1, p 41ff. (p. 47).

and white collar employees alike. This has an integrating effect and thus, although works councils are independent from unions, contributes to the prevalence of industrial unionism and the concentration of the trade union system⁵⁰¹.

Furthermore, it is also held that the possibility to take individual industrial action strengthens group-identity to the point of actually justifying the existence of a group⁵⁰². Since German unions used to be more restricted in their right to call industrial action, small unions would have lacked this feature for building a group identity.

British unions, on the other hand, did not have the need (or chance) to completely reorganise after 1945⁵⁰³. Furthermore, representation in the UK is structured more along

⁵⁰¹ Wolfgang Streek, Peter Seglow, Pat Wallace, Competition and Monopoly in Interest Representation: A Comparative Analysis of Trade Union Structure in the Railway Industries of Great Britain and West Germany, *in*: Organization Studies Vol. 2, Issue 4, p. 307ff (p. 323f.).

Blue- and white-collar workers do elect different representatives, but the ensuing council represents the whole workforce.

(Streek, et. al., cit. opp., p. 323f.).

⁵⁰² Wolfgang Streek, Peter Seglow, Pat Wallace, Competition and Monopoly in Interest Representation: A Comparative Analysis of Trade Union Structure in the Railway Industries of Great Britain and West Germany, *in*: Organization Studies Vol. 2, Issue 4, p. 307ff (p. 322).

⁵⁰³ However, there were attempts to reform the trade union movement: at the 1942 congress the railwaymen advocated an investigation into the structure to discover competition and to determine if it was uneconomic. They also wanted to investigate where policy was “diverse within an industry” with the aim of discovering “the advisability of alteration of the constitution of Unions where it can be shown that their present basis of improving the conditions of employment of their members is ineffective”. Their proposals were turned down.

In 1943 the Distributive and Allied Workers proposed an investigation by the General Council into union structure “with special regard to: (a) Uneconomic overlapping and competition. (b) what amalgamations are desirable, (c) structural or other changes necessary to ensure maximum Trade Union efficiency in the future.” This resolution passed by 3,877,000 to 1,899,000 votes, however, the Organization Committee, which was allocated the task, achieved little apart from a development of advisory councils and committees for groups of unions by the General Council. The Organization Committee ended its report with the conclusion that “the outstanding fact is the only solution to our problem is that the unions themselves must strive for closer unity and resolutely pursue that end, probably making some sacrifices on the way, until it is achieved. That fact has been known for a long time. But it has still to be faced.”

specific workplace roles than it is in Germany. British workers tend to be represented (and in turn to identify) with their shop steward, who is responsible only for their department. Thus a stronger identification with the department is achieved which may lead to the development of a separate group identity and to separate unions⁵⁰⁴.

Strikes

Differences are to be found in the type of strikes, with wildcat strikes being far more common in the UK than in Germany⁵⁰⁵. Also, the overall number of strikes and working days lost through strikes used to be higher in the UK⁵⁰⁶. Again, the reason may be found

Despite this pessimism, some mergers took place: among others, the National Union of Mineworkers was founded on January 1st, 1945, after roughly three years of preparation. (H. A. Clegg, *A History of British Trade Unions since 1889*, Volume III 1934 – 1951, Oxford 1994, p. 279f.)

Union mergers did occur throughout the post-war period; however, there was a peak in the early seventies with 61 mergers between 1969 and 1971 and 69 between 1972-74. The size of unions involved changed as well, while mostly small unions with an average size of 1,000 members merged between 1949 -62, the average membership of unions merging rose four or five fold between 1963-79.

(Robert Buchanan, *Mergers in British Trade Unions 1949-79*, in: *Industrial Relations Journal*, Vol. 12 No. 3, p. 40ff. (Table 1, p. 41).

⁵⁰⁴ Malcolm Warner, Arndt Sorge, *The Context of Industrial Relations in Great Britain and Western Germany*, in: *Industrial Relations Journal*, Vol. 11, No. 1, p. 41ff. (p. 47).

⁵⁰⁵ It was held that by the late 1960s about 90% of all strikes were unofficial. (Keith Sisson, *The Management of Collective Bargaining – An International Comparison*, Oxford 1987, p. 20.)

⁵⁰⁶ Between 1962 and 1984 the average working days lost per 1,000 employees and year in the UK were 91.91, while the corresponding number for Germany was 9.95. There was no data available as to the numbers of stoppages in Germany, however, the numbers of workers involved per 1,000 employees per year has been much smaller than in the UK (an average of 1.65 over the period from 1962 – 1984, compared to an average of 14.52 in the UK), so that it may be assumed that the overall number of strikes was smaller as well. (Michael P. Jackson, *Strikes - Industrial Conflict in Britain, U.S.A. and Australia*, Brighton and New York 1987, p. 15, 17, Tables 2.2 and 2.3.).

in differences between a voluntaristic and a legalistic system.

The tightly regulated German system makes it difficult to strike, even though these obstacles are not imposed by law but by the jurisdiction of the BAG. First of all, strikes are only legal when called by a union and conducted on topics that might be regulated in a collective agreement, so political and sympathy strikes were illegal long before they became unlawful in the UK. A strike might only be called after the end of the *Friedenspflicht*⁵⁰⁷ accompanying every agreement during its validity⁵⁰⁸. The relatively low number of strikes in Germany has also been linked to the system of *Flächentarifverträge*⁵⁰⁹ in a recent study⁵¹⁰ and, finally, a system of industrial unions, less likely to strike at company-level, developing in Germany after WWII.

In pre-Thatcher Britain, on the other hand, there were hardly any regulations on the right to strike. Strikes could be called by shop stewards without consent of the unions⁵¹¹,

⁵⁰⁷ Peace obligation.

⁵⁰⁸ Manfred Löwisch, *Arbeitsrecht*, 7th Ed., Düsseldorf 2004, Rn. 307, 344f, 352; Günter Schaub, *Arbeitsrechts-Handbuch – Systematische Darstellung und Nachschlagewerk für die Praxis*, 11th Edition, München 2005, p. 1867, § 193, Rn. 7.

⁵⁰⁹ Collective agreement concluded at national or sectoral level, thus covering an area (the literal translation of the term is ‘area agreement’).

⁵¹⁰ Study by Institut für Arbeitsmarkt – und Berufsforschung der Bundesagentur für Arbeit, IAB Kurzbericht, Vol. 13, August 9th, 2005.

It was held that, since negotiations on industry-level are orientated at the national development of productivity calculated by national statistical offices and that information is more reliable and also more accessible to all negotiators, negotiations face less uncertainty. If the facts are present, there is less room for unrealistic claims and thus less inclination to strikes. Furthermore, strikes in systems with industry-wide bargaining are often concentrated on big employers, thus acting as *Stellvertreter* (substitute) strikes. Small and middle firms can thus avoid strikes by adapting the centrally negotiated agreements.

However, the difference between centralized and less centralized systems diminished in course of time and was not significant anymore in the 1990s.

⁵¹¹ While stewards, due to the relationship with rank-and-file union members, often do figure prominently in unofficial industrial action, the perception of them as “trouble-makers” seems to be somewhat of a myth, since they often influenced their members not to strike. The Donovan Commission observed that “it is often wide of the mark to describe shop stewards as ‘troublemakers’. Trouble is thrust upon them. ...Shop stewards are rarely agitators pushing workers

political and sympathy strikes were protected. The strength of workplace organisation also contributed to the number of (unofficial) conflicts, as did workplace bargaining. Since most issues important to employment are settled at shop floor level, and the machinery for settling disputes is often unsuited to those questions, conflicts arise more easily⁵¹².

It seems therefore, that most of the differences between the German and British system of industrial relations might be attributed to a legacy of voluntarism in the UK on the one hand and a tradition of legalism in Germany on the other. Also the development of a system of industrial unions in Germany after 1945 was important and, while voluntarism did play a part in union decline and changes to industrial relations in the UK, other factors like the general economic decline after 1973, de-industrialisation and change in the workforce and an adverse political climate, have to be acknowledged as well. For a more detailed account, see Chapter I.

The question which system was or is better able to achieve its goals and which might be better equipped to deal with actual problems trade unions and employees are facing will be dealt with in the conclusion of this thesis.

towards unconstitutional action. In some instances they may be the mere mouthpiece of their work groups. But quite commonly they are supporters of order exercising a restraining influence on their members in conditions which promote disorder”

(Richard Hyman, *Strikes*, 4th Edition, Houndsmills, Basingstoke and London 1989, p. 48f.; Report of the Royal Commission on Trade Unions and Employers' Associations 1965 – 1968 (Chairman: The Rt. Hon. Lord Donovan), London 1968, p. 28, para 110)

⁵¹² Richard Hyman, *Strikes*, 4th Edition, Houndsmills, Basingstoke and London 1989, p. 47, 49.

Chapter IV

In the preceding chapters, a picture of the British and the German system of industrial relations and the core differences between them has been developed. In order to give an answer to the research question, which system is of more benefit to the (individual) worker, and which system is better adapted to changes, problems workers and unions are facing must be detailed, as must possible solutions to these. Only then an assessment as to which system might be better equipped to deal with them might be tried.

Part I will deal with problems on a national scale, while Part II will be concerned with problems and ways to deal with them on a European scale. The third Part will deal with Globalisation.

Suggested solutions are examined.

Part I – Problems on a national scale

Unemployment and Change in Membership

Unemployment has, in recent years, been more of a threat to German than to British unions, resulting in a decline in membership and bargaining power. Another effect has been a change in the structure of the workforce. The traditional sector of membership of male full-time manual workers is in decline while white collar, female and part time employment – all areas without a strong tradition of unionisation - amount to a greater part of the workforce⁵¹³. Additionally, the manual sector itself is changing from

⁵¹³ George Ross, Andrew Martin, European Unions face the Millennium, *in*: Andrew Martin, George Ross (Eds.), *The Brave New World of European Labor*, Oxford 1999, p. 1ff. (p. 11); Richard Hyman, European Unions: Towards 2000, *in*: *Work Employment & Society*, Vol. 5, No 4, p. 621ff. (p. 622, 624); Richard Hyman, Trade Unions and the Disaggregation of the Working Class, *in*:

“traditional” industry work (suspected of generating solidarity and therefore unionisation) to more skilled jobs and thus a more privileged workforce that might see less incentive to unionise. Simultaneously, there is an increase in low-skilled, insecure and atypical jobs, especially among women. These workers might not only have no tradition of unionisation, but also might “lack the resources and cohesion for collective action”.⁵¹⁴

Recruiting different Parts of the Work-Force

In order to keep union influence up, unions must try to organise these employees. Under the favourable conditions of the 1970s, with integration of unions by governments and apparent successes in collective bargaining, they were able to do so with some success⁵¹⁵ but things got more difficult when economic conditions worsened. However, as the TUC noticed in 1989, unions will need to concentrate on this “major source of potential membership”⁵¹⁶.

In order to recruit more white-collar workers, the TUC proposed offering financial service packages in 1989; however, this seems to have had only a limited effect on the decision to join⁵¹⁷. Instead, it was found that also white-collar workers have

Marino Regini (Ed), *The Future of Labour Movements*, London 1992, p. 150ff. (p. 153).

⁵¹⁴ Richard Hyman, *Trade Unions and the Disaggregation of the Working Class*, in: Marino Regini (Ed), *The Future of Labour Movements*, London 1992, p. 150ff. (p. 153f.).

⁵¹⁵ Colin Crouch, *The Future Prospects for Trade Unions in Western Europe*, in: *Political Quarterly* Vol. 57, No 1, p. 5ff. (p. 5).

⁵¹⁶ Jeremy Waddington, Colin Whitston, *Collectivism in a Changing Context: Union Joining and Bargaining Preferences among White-Collar Staff*, in: Peter Leisink, Jim Van Leemput, Jacques Vilroxx (Eds.), *The Challenges to Trade Unions in Europe*, Cheltenham 1996, p. 153ff. (p. 153).

⁵¹⁷ Jeremy Waddington, Colin Whitston, *Collectivism in a Changing Context: Union Joining and Bargaining Preferences among White-Collar Staff*, in: Peter Leisink, Jim Van Leemput, Jacques

predominantly “collective” reasons for membership⁵¹⁸. Unions are, also to white-collar workers, mainly attractive for traditional union issues and not for services other organisations can offer as well or better.

Still, trying to recruit more white-collar staff will imply paying more attention to the specifics these employees like to have addressed via collective bargaining. While traditional issues such as better pay, improved health and safety and more protection against unfair dismissal are among the most important issues for blue- as well as white-collar workers, the latter also put importance on issues such as career development and fair promotion arrangements. Female employees pay more attention to career breaks and job sharing than men. Waddington and Whitstone took this as an indicator that

“white-collar staff looks to unions to negotiate a fair and equitable framework within which individualized aspects of the employment relationship – which are often career related – may be worked out”⁵¹⁹.

Vilroxx (Eds.), *The Challenges to Trade Unions in Europe*, Cheltenham 1996, p. 153ff. (p. 153f.). Those packages included different things, among them “discount on car purchase and insurance, travel and holidays, insurance and mortgages; advice on investments; and legal advice on non-work issues.” (Waddington and Whitston, cit. opp., p. 155)

⁵¹⁸ Jeremy Waddington, Colin Whitston, *Collectivism in a Changing Context: Union Joining and Bargaining Preferences among White-Collar Staff*, in: Peter Leisink, Jim Van Leemput, Jacques Vilroxx (Eds.), *The Challenges to Trade Unions in Europe*, Cheltenham 1996, p. 153ff. (p. 156). This survey by Waddington and Whitston yielded ‘to support me if I had a problem at work’ and ‘to improve my pay and conditions’ as the two by far most prominent reasons for joining, with service packages coming in fourth at less than 10%. The survey showed also that white-collar workers are less “recruited” in the traditional sense but that a major proportion (just below 40%) made the contact to the unions themselves. Shop stewards/or local representatives made up for slightly less than a quarter of recruitments, branch secretaries for about 13%. (Waddington and Whitston, cit. opp, p. 156, 158).

⁵¹⁹ Jeremy Waddington, Colin Whitston, *Collectivism in a Changing Context: Union Joining and Bargaining Preferences among White-Collar Staff*, in: Peter Leisink, Jim Van Leemput, Jacques Vilroxx (Eds.), *The Challenges to Trade Unions in Europe*, Cheltenham, Brookfield, 1996, p. 153ff. (p. 163ff., 166).

The trend towards ‘quality bargaining’ starting to appear in the late 1980s in Germany as well as the UK might be a reaction to this preferences (see Chapter I).

Unions thus might wish to think about their bargaining agendas. Adapting them more to the preferences of white-collar workers without neglecting the traditional areas might help in recruiting those⁵²⁰; German unions might make use of the provisions that enable councils to influence training opportunities⁵²¹.

However, a greater membership of white-collar workers with their better labour market position and different interests in union membership might change the character of the

⁵²⁰ It has also been suggested that unions need to take “class” and “identity” more into account when organising workers – not only nationally, but also on an international scale: “Cross-border organizing and solidarity are essential to ensure decent standards for all and would work best if responsive to both class and personal identity factors”; “identity” “being compromised from “identity factors” such as “race, gender, ethnicity, national origin, citizenship status, community, sexual orientation, and religion. ... job, social class, career, income, and wealth”.

(Maria L. Ontiveros, *A New Course for Labour Unions: Identity-Based Organizing as a Response to Globalization*, in: Joanne Conaghan, Richard Micallef Fischl, Karl Klare (Eds.), *Labour Law in an Era of Globalization*, Oxford 2002, p. 417ff. (p. 417, 424).

However, organising merely along identity lines bears dangers: it is easy for an employers to play different such groups in a workplace off against one another; say, blacks v women. A sense of class unity therefore needs to prevail:

“But the danger from fragmentation includes more than a loss of power for workers through numerical dispersion. More fundamentally, the fragmentation of groups into particularistic notions of identity prevents the forging of larger groups, and prevents the creation of common bonds among workers because, in such a system, employees are left emphasizing their incommensurate differences while ignoring their potential commonalities. Where difference becomes the prism through which the workplace is viewed, it becomes all too easy to lose sight of the economic battle between workers and management. Focusing exclusively on identity will detrimentally affect the ability of employees to join together in order to reconstruct economic relations, and may cause employees to join together in order to reconstruct economic relations, and may cause employees to fight for power amongst each other, a situation employers are likely to welcome”

(Micael Selmi, Molly S. McUsic, *Difference and Solidarity: Unions in a Postmodern Age*, in: Joanne Conaghan, Richard Micallef Fischl, Karl Klare (Eds.), *Labour Law in an Era of Globalization*, Oxford 2002, p. 429ff. (p. 436f.).)

⁵²¹ Horst Kern, Charles F. Sabel, *Trade Unions and decentralized Production: a Sketch of Strategic Problems in the German Labour Movement*, in: Marino Regini (Ed.), *The Future of Labour Movements*, London 1992, p. 217ff. (p. 237).

unions⁵²² and thus present other problems.

The labour movement has always been fragmented and when establishing solidarity above the sphere of the individual shop-floor has demanded an effort⁵²³, integrating employees with very different positions and interests will be even more difficult. For example, workers with a higher level of wages may be less solidary when it comes to egalitarian wage claims. Also, traditionally the role of vanguard union in wage bargaining in the UK and Germany has been filled by metal worker's unions, setting the pace for the union movement as a whole⁵²⁴. Those unions are now increasingly undergoing the aforementioned changes in membership decline and structural change⁵²⁵ and it is doubtful if a vanguard position can still be filled with declining importance of the represented workers and thus the union. A shift of dominance to white collar or public service unions therefore means a shift in bargaining tactics, too. These new unions organise a class of employees rather than an industry and might therefore make demands without regard to economic considerations⁵²⁶, whereas unions organising

⁵²² Colin Crouch, *The Future Prospects for Trade Unions in Western Europe*, in: *Political Quarterly* Vol. 57, No 1, p. 5ff. (p. 6); Peter Leisink, Jim Van Leemput, Jacques Vilrocx, *Introduction*, in: Peter Leisink, Jim Van Leemput, Jacques Vilrocx (Eds.), *The Challenges to Trade Unions in Europe*, Cheltenham 1996, p. 1ff. (p. 23).

⁵²³ Richard Hyman, *Trade Unions and the Disaggregation of the Working Class*, in: Marino Regini (Ed), *The Future of Labour Movements*, London 1992, p. 150ff. (p. 159f.).
Even collective bargaining arguably is a more pragmatic than genuinely solidly united approach, recognising simply that individualistic goals might be more easily and effectively attained in combination with others. Thus it might (and has been argued) that nothing much has changed. (Hyman, cit. opp. p. 159f.).

⁵²⁴ One example for this is Germany's IG Metall (*see* Chapter I), which used to be the largest German union until the merger of five unions to the public service union ver.di.

⁵²⁵ Richard Hyman, *Trade Unions and the Disaggregation of the Working Class*, in: Marino Regini (Ed), *The Future of Labour Movements*, London 1992, p. 150ff. (p. 154); Rainer Zoll, *Modernization, Trade Unions and Solidarity*, in: Peter Leisink, Jim Van Leemput, Jacques Vilrocx (Eds.), *The Challenges to Trade Unions in Europe*, Cheltenham 1996, p. 76ff. (p. 87); Colin Crouch, *The Future Prospects for Trade Unions in Western Europe*, in: *Political Quarterly* Vol. 57, No 1, p. 5ff. (p. 6).

⁵²⁶ Colin Crouch, *The Future Prospects for Trade Unions in Western Europe*, in: *Political Quarterly*

predominantly in one industry are usually well informed about the economic situation of this industry.

In order to foster union-identification and therefore integration, new models of involvement might be needed. The “new trade unionist” is unlikely to have (yet) the same deep identification with his union as the traditional unionist; therefore being less likely to sacrifice a major part of his time to act as an official or shop-steward. Those new members need other ways to identify with their union and traditional methods of participation – the odd factory assembly – are simply not enough to do that⁵²⁷. However, the way participation is done is rooted in trade unions' history. There has always been a need to exert control over members, either because of prosecution by the state or to ensure that members would not boycott any industrial action the union might take. The need to develop and maintain a common central policy is also important in this regard. Trade unions thus traditionally favoured a more restrictive approach to participation, with members handing over responsibility to the officials. Realising more participative structures therefore might be difficult⁵²⁸, but it will be necessary.

Vol. 57, No 1, p. 5ff. (p. 6f.).

⁵²⁷ Rainer Zoll, Modernization, Trade Unions and Solidarity, *in*: Peter Leisink, Jim Van Leemput, Jacques Vilroxx (Eds.), *The Challenges to Trade Unions in Europe*, Cheltenham 1996, p.76ff. (p. 81).

Zoll points out that “their [the trade unions'] policies are still conceived in terms of doing something 'for' women, 'for' the unemployed, or 'for' any socially disadvantaged group, rather than acting 'with' them.”

(Zoll, cit. opp., p. 83)

⁵²⁸ Rainer Zoll, Modernization, Trade Unions and Solidarity, *in*: Peter Leisink, Jim Van Leemput, Jacques Vilroxx (Eds.), *The Challenges to Trade Unions in Europe*, Cheltenham 1996, p.76ff. (p. 85); Ben Valkenburg, Individualization and Solidarity: the Challenge of Modernization, *in*: Peter Leisink, Jim Van Leemput, Jacques Vilroxx (Eds.), *The Challenges to Trade Unions in Europe*, Cheltenham 1996, p. 89ff. (p. 94).

To be fair, it has to be said that members do not appear especially eager to participate more actively in their unions, most seem quite content with the delegation of tasks to the officials. One has to keep in mind, however, that unions do not exactly encourage participation and members therefore probably do not expect anything could change should they voice their wishes to become more

Developing a Different Approach in order to keep Influence at the Workplace up

In order to overcome declining influence, “an enterprise level, partnership-orientated focus” has been suggested⁵²⁹. Such an approach implies that employers and unions try to find a consensus on issues that are best resolved by joint action. For this, labour and capital will have to accept that improving business performance is imperative⁵³⁰.

A partnership approach is inconsistent with industrial action; therefore unions need to reconsider their traditional ways of pressing demands⁵³¹. Strikes are “still the strongest means of exercising power” for unions and securing as much influence with a “partnership-oriented approach” without strong legal rights might be difficult⁵³². Without the right to strike and without legal rights, unions will have no effective means of pressing their demands. Decisions will therefore ultimately be taken by management. There is, furthermore, a danger that unions might be enticed into managerial thinking. Additionally, a decision to refrain from strike might be hard to communicate to members, especially to ‘traditional’ members⁵³³.

integrated.

(Valkenburg, cit. opp., p. 104).

⁵²⁹ Mike Rigby, Approaches to the contemporary Role of Trade Unions, *in*: Mike Rigby, Roger Smith, Teresa Lawlor (Eds), European Trade Unions – Change and Response, London 1999, p. 18ff. (p. 21).

⁵³⁰ Mike Rigby, Approaches to the contemporary Role of Trade Unions, *in*: Mike Rigby, Roger Smith, Teresa Lawlor (Eds), European Trade Unions – Change and Response, London 1999, p. 18ff. (p. 22).

⁵³¹ Peter Leisink, Jim Van Leemput, Jacques Vilroxx, Introduction, *in*: Peter Leisink, Jim Van Leemput, Jacques Vilroxx (Eds.), The Challenges to Trade Unions in Europe, Cheltenham 1996, p. 1ff. (p. 9).

⁵³² Peter Leisink, Jim Van Leemput, Jacques Vilroxx, Introduction, *in*: Peter Leisink, Jim Van Leemput, Jacques Vilroxx (Eds.), The Challenges to Trade Unions in Europe, Cheltenham 1996, p. 1ff. (p. 14).

⁵³³ Leisink, Van Leemput and Vilroxx comment on this: “...as strike research has shown, not only do more members lead to more strikes, but also, and probably to an even larger extent, strikes lead to

While a partnership approach may have certain benefits, ensuring at least information and consultation where nothing else is attainable, it seems dangerous. Information and consultation rights may appear sufficient to some workers and so detain them from membership⁵³⁴. More importantly, it has to be accepted that labour and capital have essential different interests and partnership thus is difficult. Since capital is – especially with high unemployment rates – in the stronger position, totally giving up on means of industrial action would be naïve, as would be depending on employers’ goodwill by relying on partnership without strong means (be it industrial action or legal rights) to influence decisions. As Leisink *et. al.* put it:

“Even if the working class as a whole would completely give up the idea of a socialist society, without the threat of stoppages it would soon be at the mercy of at least some part of a divided capitalist class”⁵³⁵.

Integrate the Unemployed

More and more in Germany, being unemployed is changing from being a short and passing phenomenon to a condition that might last for years, if not a lifetime. Unions need to try to take unemployment and unemployed into account by developing new

more members”. This could be observed in the Spring 2006 strike of ver.di in Germany which led to a growth in applications for membership.

(Peter Leisink, Jim Van Leemput, Jacques Vilroxx, Introduction, *in*: Peter Leisink, Jim Van Leemput, Jacques Vilroxx (Eds.), *The Challenges to Trade Unions in Europe*, Cheltenham 1996, p. 1ff. (p. 15).)

⁵³⁴ Colin Crouch, *The Future Prospects for Trade Unions in Western Europe*, *in*: *Political Quarterly* Vol. 57, No 1, p. 5ff. (p. 10).

⁵³⁵ Peter Leisink, Jim Van Leemput, Jacques Vilroxx, Introduction, *in*: Peter Leisink, Jim Van Leemput, Jacques Vilroxx (Eds.), *The Challenges to Trade Unions in Europe*, Cheltenham 1996, p. 1ff. (p. 14).

policies that not only try to safeguard the employed against becoming unemployed but also try to find ways for a more just way of distributing labour. In 1986, Crouch pointed out that

“a further development is likely to be increasing division between workers with reasonably secure, full-time and legally protected jobs and those in temporary, often part-time unprotected ones. This is a consequence of two forces: on the one hand unionised and some other groups will try to protect the gains in job security and working conditions made during the 1970s; on the other hand, capital will seek increasing flexibility to face the more precarious economic environment. ... If unions primarily represent the secure work force, the co-operation in restructuring may be bought precisely by requiring insecure groups to bear the brunt of adjustment”⁵³⁶.

If they want to win the unemployed as members, they will have to take their needs, quite different from traditional union areas like bargaining for terms and conditions, into account⁵³⁷. In trying to deal with unemployment, unions might want to exert political influence; e.g. lobbying for different economic policies or at least better training programmes and benefits for the unemployed. When continuing to concentrate on the more secure parts of the labour force (which would be understandable, since those are more likely to be members) unions might no longer be perceived as (also) representatives of the weakest parts of labour, thus inviting competition from other organisations, left and right⁵³⁸.

⁵³⁶ Colin Crouch, *The Future Prospects for Trade Unions in Western Europe*, in: *Political Quarterly* Vol. 57, No 1, p. 5ff. (p. 7, 8).

⁵³⁷ See: Peter Leisink, Jim Van Leemput, Jacques Vilrocx, *Introduction*, in: Peter Leisink, Jim Van Leemput, Jacques Vilrocx (Eds.), *The Challenges to Trade Unions in Europe*, Cheltenham 1996, p. 1ff. (p. 9).

⁵³⁸ Colin Crouch, *The Future Prospects for Trade Unions in Western Europe*, in: *Political Quarterly* Vol. 57, No 1, p. 5ff. (p. 8); Peter Leisink, Jim Van Leemput, Jacques Vilrocx, *Introduction*, in: Peter Leisink, Jim Van Leemput, Jacques Vilrocx (Eds.), *The Challenges to Trade Unions in*

Part II - Problems on a European Scale

Introduction

For the impartial viewer, industrial relations still seem to happen mostly on a national scale. However, national economies are increasingly involved in international trade, 90% of which takes place within the European community⁵³⁹. Therefore, Europeanization might prove more important for trade unions than globalisation.

Furthermore, experiences with European politics and Directives show that getting involved on a European level is necessary; after all, European Directives have a major influence on working conditions in the member states. The conflict around the Services Directive highlights not only the necessity but also the possibilities of such involvement. It is intended to ease inter-European trade and part of the proposed legislation envisaged that service-providers located in one member state should be able to provide the service in another member state with as little or no legal and administrative barriers as possible. The most controversial provisions are those regarding the ‘country-of-origin-principle’. This shall allow service-providers to temporarily offer their services on foreign markets while being subject to the laws of the country their company is located in rather than to those of the country they are operating in. Thus a cleaning operative located in Poland would have been enabled to offer cleaning services in the UK while treating his staff according to Polish law and paying

Europe, Cheltenham 1996, p. 1ff. (p. 9).

⁵³⁹ Richard Hyman, Trade Unions and the European Social Model, *in*: Economic and Industrial Democracy, Vol. 26, No. 1, p.9 ff. (p. 13).

Polish wages⁵⁴⁰. National unions and the ETUC opposed the Directive in its proposed form for fear that it would lead to social dumping⁵⁴¹. It also seemed to be contrary to the Directive on Posting of Workers, stipulating that workers who have been dispatched to another member are to be treated according to the laws of the host country⁵⁴².

The ETUC lobbied the members of the Internal Market Committee of the European Parliament to exempt public services and certain other sectors from the scope of the Directive and to clarify that it shall have no effect on labour law, collective bargaining and industrial relations. It also argued that the country-of-origin principle should be abandoned, since it would, without “sufficient level of harmonisation or equivalent provisions ... create a destructive race to the bottom”; holding that the Directive would harm workers’ rights and endanger the values of a social Europe⁵⁴³.

In a new proposal of April 4th, 2006, including amendments made by the European Parliament in a first reading, the country-of-origin-principle was replaced by a provision regarding the freedom to provide services. The effect of this is that member states are still obliged to allow service providers from other member states “free access to and free exercise of the service activity within its territory”, including the obligation to allow the service provider to work under the conditions of its home country. However, member

⁵⁴⁰ Wikipedia, Directive on Services in the Internal Market, http://en.wikipedia.org/wiki/Directive_on_services_in_the_internal_market, last accessed April 22nd, 2006.

⁵⁴¹ Verdi.de, Argumentation zum Herkunftslandprinzip in der EU-Dienstleistungsrichtlinie, http://www.verdi.de/kampagnen_projekte/eu-dienstleistungsrichtlinie/bestellschein_vordrucke/argumentation_zum_herkunftslandprinzip_in_der_eu-dienstleistungsrichtlinie, last accessed April 6th, 2006; ETUC, ETUC challenges Commission Proposal for Liberalisation of Services, <http://www.etuc.org/a/436>, last accessed April 22nd, 2006.

⁵⁴² Verdi.de, Argumentation zum Herkunftslandprinzip in der EU-Dienstleistungsrichtlinie, http://www.verdi.de/kampagnen_projekte/eu-dienstleistungsrichtlinie/bestellschein_vordrucke/argumentation_zum_herkunftslandprinzip_in_der_eu-dienstleistungsrichtlinie, last accessed April 6th, 2006.

⁵⁴³ ETUC, Letter to Members of the Internal Market Committee, found at: http://www.dienstleistungsrichtlinie.dgb.de/gewerkschaften/2_2.htm, last accessed April 6th, 2006.

states are now able to impose their own requirements if these are “justified on grounds of public policy, public security, public health or the protection of the environment, they are non-discriminatory, necessary and proportionate”⁵⁴⁴.

Unions played their part in this amendment. The ETUC mobilised about 50,000 European workers to demonstrate before the European Parliament in Strasbourg at the eve of the vote of the first reading of the Directive. Subsequently to welcoming the EP’s vote⁵⁴⁵, the ETUC very cautiously welcomed the new proposal in April 2006⁵⁴⁶.

Finding a common response to European policy is not only necessary when it comes to Directives. The European Council each year publishes “Broad Economic Guidelines” which are drafted by the Commission and unfailingly advocate wage rises below productivity and greater differentiation between wages on geographical and occupational terms⁵⁴⁷.

⁵⁴⁴ Commission of the European Communities, Amended Proposal for a Directive of the European Parliament and the Council on Services in the Internal Market, Brussels 4. 4. 2006, COM 2006 (160) Final, 2004/0001 (COD), http://europa.eu.int/comm/internal_market/services/docs/services-dir/guides/amended_prop_en.pdf, last accessed April 22nd, 2006.

⁵⁴⁵ The compromise “approved, by a large majority, the compromise reached by the main political groups in the Parliament, at the same time burying the initial Bolkestein proposal and putting a new text in its place”.

ETUC, A major Victory for European Workers: the Initial Bolkestein Proposal is Dead, <http://www.etuc.org/a/2081>, last accessed April 22nd, 2006.

⁵⁴⁶ ETUC’s General Secretary John Monk is quoted as saying: “We appreciate the fact that the Commission has respected its commitment, although we will need to check the various changes in more detail. At first sight, some amendments appear incomplete, confusing or even inaccurate. The ETUC will ask the Council to examine these points closely.”
ETUC, ETUC values Commission’s efforts to respect main provisions of the European Parliament’s Compromise on the Services Directive, <http://www.etuc.org/a/2271>, last accessed April 22nd, 2006.

⁵⁴⁷ Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p. 4.

Finally, it is feared that the European Monetary Union will increase wage dumping. Since exchange rates aren't available for cushioning out productivity differences anymore, employers more and more see labour costs as the main adjustment mechanism for economic difficulties⁵⁴⁸. The setting up of the ECB has already prompted continuing discussions between ETUC, ECB and the Commission on the relation between prices, wages, employment and economic performance⁵⁴⁹.

Additionally, coordination takes place on employers' side: multinationals' headquarters pressure local managements to increase productivity on the basis of 'best practice'; connected with a threat to unions that non-implementation of those practices will lead to relocation. This has the effect of very similar collective agreements across Europe. Also, multinational companies are collecting data on labour costs and use it in their decision where to invest or close down sites⁵⁵⁰. If European workers do not want to be played off against each other, this needs a European response.

Since all of these are European phenomena, meaningful reaction requires European action. The need to become involved on a European scale thus becomes clear. This section will deal with different attempts undertaken by labour to become influential in the shaping of European industrial relations.

⁵⁴⁸ Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p. 4.

⁵⁴⁹ Keith Sisson, Paul Marginson, Co-Ordinated Bargaining: A Process for our Times?, *in*: British Journal of Industrial Relations, Vol. 40, No. 2, p. 197ff. (p. 212).

⁵⁵⁰ eiro online, The Europeanisation of Collective Bargaining, <http://www.eiro.eurofound.eu.int/print/1999/07/study/tn9907201s.html>, last accessed April 12th, 2006; Keith Sisson, Paul Marginson, Co-Ordinated Bargaining: A Process for our Times?, *in*: British Journal of Industrial Relations, Vo. 40, No. 2, p. 197ff. (p. 198f).

Suggested Solutions

ETUC

The European Trade Union Confederation (ETUC) seems like an obvious response by labour to increasing Europeanization by employers. The main trade union actor on the European stage; it represents about 60 million workers in 81 union federations from 36 European countries and 12 European industry federations⁵⁵¹. It sees its main duty not in collective bargaining but in lobbying EU decision making, especially in areas of social and employment policies. It has thus been held that the ETUC “has tried to institutionalize its presence in the EU more as a political force than as a trade union organization”⁵⁵².

The ETUC faces a number of problems. Not only does it, as a mere union confederation, not have the right to strike, it also lacks power as national unions have been less than willing to transfer authority to it⁵⁵³. The effect is that the ETUC possesses only a limited base for industrial action and has thus tried to become more integrated into the EU's decision making process. While this has proven to be a way to take influence, it has also made the ETUC less politically independent. In fact, it has been held that it largely depends on the European Commission on organisational, political

⁵⁵¹ ETUC, Our Members, <http://www.etuc.org/r/13>, last accessed April 22nd, 2006.

⁵⁵² Mike Rigby, Approaches to the Contemporary Role of Trade Unions, *in*: Mike Rigby, Roger Smith, Teresa Lawlor (Eds.), *European Trade Unions – Change and Response*, London 1999, p. 18ff. (p. 29).

⁵⁵³ Jeremy Waddington, Trade Unions and the Defence of the European Social Model, *in*: *Industrial Relations Journal*, Vol. 36, Issue 6 (Annual European Review 2005), p. 518ff. (p. 534); Graham Taylor, Andrew Mathers, The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism, *in*: *European Journal of Industrial Relations*, Vol. 10, No.3, p. 267ff. (p. 271).

and financial terms⁵⁵⁴. This dependence has had the effect that national unions in turn identify less with the ETUC and continue focusing on their home countries rather than on the EU, thus further weakening the ETUC.

The ETUC therefore has not been able to develop a transnational European workers' identity or even just a "positive vision of social Europe", thus failing to become an effective and autonomous agent of regulation within the emergent institutions of the EU⁵⁵⁵. Taylor and Mathers identified as its main weaknesses "a focus on institution-building rather than mobilization, an overdependence on the European Commission, and ideological and tactical division between and within its constituent confederations"⁵⁵⁶.

The strategy of the ETUC, to try and be influential by lobbying and compromising within the corridors of power rather than relying on traditional union methods such as industrial conflict, has, on the national level, mostly been a reaction of unions to "defeats and weakness"⁵⁵⁷. If such a strategy is adopted as a positive one on European level, one gets a clear impression of the standing and influence of the ETUC.

The ETUC therefore seems to be in an unenviable position. Little support from national confederations forced it into closer cooperation with the European political institutions, which in turn led to further alienation from its constituents. The integration into

⁵⁵⁴ Graham Taylor, Andrew Mathers, The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism, *in*: European Journal of Industrial Relations, Vol. 10, No.3, p. 267ff. (p. 271).

⁵⁵⁵ Graham Taylor, Andrew Mathers, The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism, *in*: European Journal of Industrial Relations, Vol 10, No.3, p. 267ff. (p. 271).

⁵⁵⁶ Graham Taylor, Andrew Mathers, The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism, *in*: European Journal of Industrial Relations, Vol. 10, No. 3. p. 267ff. (p. 267).

⁵⁵⁷ Graham Taylor, Andrew Mathers, The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism, *in*: European Journal of Industrial Relations, Vol. 10, No. 3. p. 267ff. (p. 279).

European politics and the resulting lack of radicalism also present the danger of a division of the union movement, if more radical national unions take the space with clearly defined criticism and opposition to European social policy⁵⁵⁸.

The question is, therefore, what the ETUC should do.

That said, the ETUC is not as ineffective as one might believe. For example, it managed to pressure the European Parliament into voting against the possibility to opt-out from the Working Time Directive and succeeded in securing some important provisions regarding social security and labour rights in the doomed European Constitution⁵⁵⁹. These might be examples of making use of its position within the structures of the EC, however, it also tried to influence the European Charter of Fundamental Rights by collaborating with NGOs and jointly producing a campaign paper. This campaign also included national unions and confederations; showing the general ability of (and possibility for) the ETUC to mobilise constituents and allies. Even though it failed⁵⁶⁰, elements of a new strategy began to emerge: “a closer alignment with other European NGOs in an attempt to develop a common agenda and the mobilization of European trade unionists on key European issues”⁵⁶¹.

These actions show that the ETUC is looking for new ways to act on the European stage

⁵⁵⁸ Graham Taylor, Andrew Mathers, The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism, *in*: European Journal of Industrial Relations, Vol. 10, No. 3. p. 267ff. (p. 275).

⁵⁵⁹ Jeremy Waddington, Trade Unions and the Defence of the European Social Model, *in*: Industrial Relations Journal, Vol. 36, Issue 6 (Annual European review 2005), p. 518ff. (p. 534).

⁵⁶⁰ Graham Taylor, Andrew Mathers, The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism, *in*: European Journal of Industrial Relations, Vol. 10, No. 3. p. 267ff. (p. 273f.).

⁵⁶¹ Graham Taylor, Andrew Mathers, The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism, *in*: European Journal of Industrial Relations, Vol. 10, No. 3. p. 267ff. (p. 276).

and is thereby “tentatively moving towards a role as ‘social movement’”. In this way it might succeed in developing a “distinctive identity with a positive vision of a social Europe capable of mobilizing European workers around European issues”⁵⁶². When trying to change its role from an “exclusive focus on institutional social partnership towards a more campaigning social movement model”⁵⁶³, another important step would be to develop a clear idea of the different Europe the ETUC wants to achieve – the “new social movements” that are so successful in recruiting supporters offer exactly this: “a vision of a different future”⁵⁶⁴.

There are, however, certain problems the ETUC is facing when trying to develop in this way. First, it will have to try to overcome a certain inactivity acquired by three decades spent within the institutions of the European Community. Secondly, it will have to change its set-up to a more democratic one. Even the campaigns mentioned and present attempts at cooperation with other social actors have mostly been steered from above rather than below⁵⁶⁵.

⁵⁶² Graham Taylor, Andrew Mathers, *The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism*, in: *European Journal of Industrial Relations*, Vol. 10, No. 3. p. 267ff. (p. 277).

⁵⁶³ Jeremy Waddington, *Trade Unions and the Defence of the European Social Model*, in: *Industrial Relations Journal*, Vol. 36, Issue 6 (Annual European review 2005), p. 518ff. (p. 531f.).

⁵⁶⁴ Richard Hyman, *Trade Unions and the European Social Model*, in: *Economic and Industrial Democracy*, Vol. 26, No. 1, p.9ff. (p. 31).

However, while this might prove to be a promising route on the way to greater membership involvement, it has to be doubted if it will translate into gaining (better) results. Even though the new social movements like attac and the live8 movement of the summer of 2005 do attract a large number of predominantly young urban people, it seems doubtful whether these are really attracted by the issues (and therefore capable of contributing to solutions) or rather by some form of ‘rebel chic’ – after all, anti-poverty wristbands were an important fashion statement in that summer.

⁵⁶⁵ Graham Taylor, Andrew Mathers, *The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism*, in: *European Journal of Industrial Relations*, Vol. 10, No. 3. p. 267ff. (p. 278).

A transnational union structure without traditional union rights or agendas, another problem for the ETUC has always been that of identity. Traditionally, trade union identity revolves around interest representation, democratic structure, agenda framing and power mobilisation. Since national unions are unwilling to devolve powers to the ETUC, these are mostly done on national level. The ETUC therefore was not able to develop a distinctive identity; an indication is “the lack of an effective strategy and vision vis-à-vis the development of social Europe” ⁵⁶⁶. Taylor and Mathers have suggested a strategy of “internal social dialogue”, in which a transnational identity will be achieved by integrating national identities and orientations⁵⁶⁷. They also suggest that the ETUC might want to continue the cooperation with the fashionable global justice movements, thus counteracting the impression of “elite-networking”, that leaves national unions and members with the feeling that they have no way of influencing the ETUC’s policy⁵⁶⁸.

In this regard it also seems important that the ETUC gets more into contact with its member organisations, since “effective international solidarity is impossible without a ‘willingness to act’ on part of grassroots trade unionists⁵⁶⁹”. One way of doing this might be to change the internal organisation, thus giving affiliated confederations a

⁵⁶⁶ Graham Taylor, Andrew Mathers, The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism, *in*: European Journal of Industrial Relations, Vol. 10, No. 3. p. 267ff. (p. 270f.).

⁵⁶⁷ Graham Taylor, Andrew Mathers, The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism, *in*: European Journal of Industrial Relations, Vol. 10, No. 3. p. 267ff. (p. 279).

⁵⁶⁸ Graham Taylor, Andrew Mathers, The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism, *in*: European Journal of Industrial Relations, Vol. 10, No. 3. p. 267ff. (p. 280f).

⁵⁶⁹ Graham Taylor, Andrew Mathers, The European Trade Union Confederation at the Crossroads of Change? Traversing the Variable Geometry of European Trade Unionism, *in*: European Journal of Industrial Relations, Vol. 10, No. 3. p. 267ff. (p. 280f).

greater say and individual members more information. Hyman has dubbed this an “internal social dialogue”; an

“open-ended method of shaping unions’ own goals and methods, in which leaders and officials certainly offer strategic direction but in which members themselves contribute to shaping policies which they understand and own – and on behalf of which they are prepared to act collectively”⁵⁷⁰.

While the ETUC should try to free itself from its dependence of EU’s institutions, its “institutionalisation” might also prove of benefit. When in closer contact with its constituents, the ETUC could put its influence to good use by lobbying for Directives or policy changes its affiliates deem necessary. However, it has to be kept in mind that Directives generally take a long time from first idea to actual adoption – the Works Council Directive, adopted in 1994, was first proposed in 1980. Additionally, most Directives just legalise what is already practice in the majority of member states⁵⁷¹. Therefore, lobbying for Directives might not be the most effective or fastest way to bring about changes.

Bargaining on a European Level

As yet, there is no European style collective bargaining to speak of; that is, no institutionalised rounds of negotiations between the ETUC and employers or European employers’ associations.

There are different reasons for this.

First, the ETUC is thought to be rather removed from its constituency. National

⁵⁷⁰ Richard Hyman, Trade Unions and the European Social Model, *in*: Economic and Industrial Democracy, Vol. 26, No. 1, p. 9ff. (p. 30).

⁵⁷¹ Jeremy Waddington, Trade Unions and the Defence of the European Social Model, *in*: Industrial Relations Journal, Vol. 36, Issue 6 (Annual European Review 2005) p. 518ff. (p. 534).

confederations are held to be not in touch with the issues and concerns of their members⁵⁷², and this must be even more true for an international confederation that is one step further removed from the individual member. To make European bargaining possible, therefore, the ETUC first would need to try to get into closer contact with its base to learn about the problems and issues members think are worth dealing with. An easy way to do this would be to use the possibilities of modern communication methods and try to learn about members' views via, for example, a dedicated website with a feedback form.

Additionally, the ETUC would have to try to make its presence more known to workers. Since it acts mostly on a European scale and is concerned with lobbying rather than with bargaining, it does not feature very prominently in national news and might therefore be not very well known. This namelessness also reinforces the fact that the ETUC seems not to be in touch with its members – an organisation that is unbeknownst to those that are supposed to benefit from it is unlikely to get a lot of feedback from them.

Secondly, a number of issues that, on national scale, are traditionally determined by collective agreements are taken care of by way of Directives on the European level. While in most jurisdictions the law provides a framework for agreements (and collective bargaining is done nevertheless), the situation is slightly different on European level. It would be very difficult to conclude an agreement that would determine, for example, working time for a certain sector of industry in all member states since conditions in the individual member states are too diverse. All the ETUC could hope to achieve therefore

⁵⁷² Mike Rigby, *Approaches to the Contemporary Role of Trade Unions*, in: Mike Rigby, Roger Smith, Teresa Lawlor (Eds.), *European Trade Unions – Change and Response*, London, New York 1999, p. 18ff. (p. 30).

would be some kind of framework agreement – which is exactly what the Directives provide. Thus, the task the ETUC could hope to fulfil with collective bargaining is already administered by the EU institutions. Also, even though there is yet no European minimum wage, wage bargaining on European level faces specific problems. While bargaining on pay is one of the core functions of unions it is very difficult to negotiate on a European scale. Even though wages have become more easily comparable with the introduction of the single currency, the situation in the member states regarding costs of living, taxes, social security contributions etc. is still fairly diverse. Thus, the minimum wage in country *A* would need to be different from that in country *B*. This admittedly would make bargaining not impossible; but much more complicated. Apart from that it might be difficult to arbitrate different minimum wages in different member states to workers.

Thirdly, European collective bargaining would have to deal with the fact that there are now 27 member states, each with a distinct and often very different tradition of collective bargaining. To reconcile these differences might prove difficult – for example, should the resulting agreements be legally binding like in Germany, or not, like in the UK? The different sectoral boundaries within industries would present another problem⁵⁷³, and, furthermore, the idea of European bargaining, which by definition would take place on (at least) the industrial level, might seem very foreign to countries like the UK, where bargaining is mostly done on company level.

Social Dialogue

⁵⁷³ Rob de Boer, Hester Benedictus, Marc van der Meer, Broadening without Intensification: The added Value of the European Social and Sectoral Dialogue, *in*: European Journal of Industrial Relations, Vol. 11, No. 1, p. 50ff. (p. 54).

Another way for labour to influence European politics is the social dialogue.

In 1997, the social dialogue, formerly present in the Maastricht ‘social protocol’, was laid down in Art 136 of the Treaty. The social partners not only have the right to be consulted on the Commissions’ social policy proposals, they can also present their agreements to the Commission and the Council which then might adopt them as Directive. Another way of implementing their agreements is for the social partners to “make recommendations to their members and the social partners undertake to follow them up at national level”, by way of codes of conduct, best practice guidelines and framework agreements. However, those measures are in most cases non-binding and rely on the actors at national level for implementation⁵⁷⁴.

It has to be understood that even though the results of the social dialogue are named ‘agreements’, they are distinctively different from national (traditional) collective agreements. First, social dialogue agreements are not concerned with wages but rather try to lay down social minimum standards which naturally have only little effect in member states with more advanced social security systems. Secondly, they cover only a small part of the issues normally part of industrial relations; pay, for example, is explicitly excluded under the Amsterdam treaty⁵⁷⁵.

⁵⁷⁴ Paul Marginson, *Industrial Relations at European Sector Level: The Weak Link?*, in: *Economic and Industrial Democracy*, Vol. 26, Issue 4, p. 511ff. (p. 516); Rob de Boer, Hester Benedictus, Marc van der Meer, *Broadening without Intensification: The added Value of the European Social and Sectoral Dialogue*, in: *European Journal of Industrial Relations*, Vol. 11, No 1, p. 50ff. (p. 50f.).

⁵⁷⁵ Thorsten Schulten, *Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy*, WSI Discussion Paper No. 101, Düsseldorf 2002, p. 3; Rob de Boer, Hester Benedictus, Marc van der Meer, *Broadening without Intensification: The added Value of the European Social and Sectoral Dialogue*, in: *European Journal of Industrial Relations*, Vol. 11, No 1, p. 50ff. (p. 53); Keith Sisson, Paul Marginson, *Co-Ordinated Bargaining: A Process for our times?*, in: *British Journal of Industrial Relations*, Vo. 40, No. 2, p. 197ff. (p. 211).

The Social Dialogue has never evolved into a system of ‘European industrial relations’; different reasons account for that. First, as mentioned above, the European Community is made up of 27 national states with very different traditions when it comes to industrial relations. In addition to that, the structures of trade unions, employers’ associations and other actors on the industrial relations stage vary, the different sectoral boundaries within industries make common interest representation on European level difficult⁵⁷⁶.

Secondly, especially on the sectoral level, labour is missing a ‘proper’ employers’ organisation as bargaining partner. While UNICE on the European level is not structured along sectoral lines, the employers’ interest organisations on the European sectoral level are primarily “trade or business organisations” representing economic interests of firms, and therefore often do not possess the authorisation or competence to negotiate. The underlying force is a general unwillingness on employers’ side to

“engage in sector social dialogue, at best questioning its relevance and at worst fearing that by providing trade unions with an institutional platform the process might eventually lead to European-level collective bargaining”⁵⁷⁷.

Employers perceive European (economic) integration as a chance to circumvent national social regulations and to profit from increased competition between the member states⁵⁷⁸. Particularly in Germany they thus favour, quite contrary to the concept of the social dialogue, a further decentralisation of bargaining down to

⁵⁷⁶ Rob de Boer, Hester Benedictus, Marc van der Meer, Broadening without Intensification: The added Value of the European Social and Sectoral Dialogue, *in*: European Journal of Industrial Relations, Vol. 11, No 1, p. 50ff. (p. 54).

⁵⁷⁷ Paul Marginson, Industrial Relations at European Sector Level: The Weak Link?, *in*: Economic and Industrial Democracy, Vol. 26, Issue 4, p. 511ff. (p. 519).

⁵⁷⁸ Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p. 3.

company level, arguing that bargaining must be able to react to different economic conditions at national and local level. This of course would also, for them, have the advantage of continued social dumping by “exerting downward pressure” by threatening to “locate different kinds of production in different kinds of regime, according to the varying combinations of skill requirement, and wage and productivity levels”⁵⁷⁹.

And while the unions’ side is well organised on sectoral level around the European Industrial Federations, these too tend to lack authorisation from their affiliates for negotiations⁵⁸⁰.

Thirdly, the leeway for social policy on European level is narrower than on national level. Because the “social agenda” is less extensive on the European level, the Commission is less able than national governments to “force” the social partners into negotiations, since there is less to be gained. This has the effect of social policy still being mainly a national affair, thus social actors are dealing with it mostly on the national level⁵⁸¹. As De Boer *et al* indicate:

“The evident question is why one would want to discuss issues, or even negotiate agreements within the framework of the ESD, if a more favourable outcome can be achieved through other channels available in the multi-level system of European policy development, principally the national system of industrial relations.”⁵⁸²

⁵⁷⁹ eiro online, The Europeanisation of Collective Bargaining, <http://www.eiro.eurofound.eu.int/print/1999/07/study/tn9907201s.html>, last accessed April 12th, 2006.

⁵⁸⁰ Paul Marginson, Industrial Relations at European Sector Level: The Weak Link?, *in*: Economic and Industrial Democracy, Vol. 26, Issue 4, p. 511ff. (p. 519).

⁵⁸¹ Rob de Boer, Hester Benedictus, Marc van der Meer, Broadening without Intensification: The added Value of the European Social and Sectoral Dialogue, *in*: European Journal of Industrial Relations, Vol. 11, No 1, p. 50ff. (p. 55); Keith Sisson, Paul Marginson, Co-Ordinated Bargaining: A Process for our Times?, *in*: British Journal of Industrial Relations, Vo. 40, No. 2, p. 197ff. (p. 211).

⁵⁸² Rob de Boer, Hester Benedictus, Marc van der Meer, Broadening without Intensification: The added Value of the European Social and Sectoral Dialogue, *in*: European Journal of Industrial Relations, Vol. 11, No 1, p. 50ff. (p. 55f.).

Finally, it has been held that one of the reasons the social dialogue has never become really effective is its failure to show a capacity for innovative regulation due to the fact that the social partners have the ability to obstruct each other⁵⁸³.

Social Dialogue therefore is for the most part dependent on a voluntary cooperation between unions and employers' organisations, and the employers' side has been less than enthusiastic⁵⁸⁴. However, in 2001 the social partners composed the Laeken declaration, opting for "more emphasis on autonomous, bi-partite dialogue aimed at the conclusion of voluntary, non-legally binding agreements", to be implemented through the negotiations between unions and employers in the member states; thus rejecting the possibility opened up by the Amsterdam Treaty to let agreements evolve into Directives⁵⁸⁵.

The Social Dialogue thus has mostly been used as a form of lobbying by the social partners, giving them more direct access to the policy process on the wide range of issues that are in the competence of the Commission⁵⁸⁶.

It might be time to say good-bye to the idea of Social Dialogue as bargaining on a

⁵⁸³ Wolfgang Schroeder, Rainer Weinert, Designing Institutions in European Industrial Relations: a strong Commission versus weak Trade Unions?, *in*: European Journal of Industrial Relations Vol. 10, No. 2, p. 199ff. (p. 201).

⁵⁸⁴ Rob de Boer, Hester Benedictus, Marc van der Meer, Broadening without Intensification: The added Value of the European Social and Sectoral Dialogue, *in*: European Journal of Industrial Relations, Vol. 11, No 1, p. 50ff. (p. 55).

⁵⁸⁵ Rob de Boer, Hester Benedictus, Marc van der Meer, Broadening without Intensification: The added Value of the European Social and Sectoral Dialogue, *in*: European Journal of Industrial Relations, Vol. 11, No 1, p. 50ff. (p. 64, 67).

⁵⁸⁶ Rob de Boer, Hester Benedictus, Marc van der Meer, Broadening without Intensification: The added Value of the European Social and Sectoral Dialogue, *in*: European Journal of Industrial Relations, Vol. 11, No 1, p. 50ff. (p. 62, 64, 66).

European scale in order to appreciate its potential. After all, it does open up the possibility for the social partners to have an institutionalised channel for lobbying the corridors of power in the EU, thus giving them a privileged position among interests groups. And while lobbying for Directives might be a rather slow form of exerting an influence, it nevertheless does carry the possibility for change.

The ETUC should therefore abide by the social dialogue; however, it should not regard it as the *only* way to influence things. A combined strategy of Social Dialogue, closer contact with member organisations and exerting its influence in the Commission seems to be the most promising strategy.

Coordinated Wage bargaining

Another way in which (national) unions could try to act on the European scale is to form co-operations with other unions in the EC. An example for this might be the *Memorandum of Understanding* between ver.di (Germany) and UNISON (UK). The aim of the memorandum is to design concerted strategies such as “joint collective bargaining strategies” and “joint recruitment campaigns” for acting in private companies that both unions have members in⁵⁸⁷.

Due to European integration, wage policies in the member states are interconnected. Therefore, if the wage level decreases in one member state, the rest will have to lower their levels as well in order to stay competitive⁵⁸⁸. This results in an adverse situation for

⁵⁸⁷ Jeremy Waddington, Trade Unions and the Defence of the European Social Model, *in*: Industrial Relations Journal, Vol. 36, Issue 6 (Annual European Review 2005), p. 518ff. (p. 531f.).
Such companies include Sodexho, ISS, Veolia (Vivendi), RWE/Thames Water and Innology (Waddington, cit. opp., p. 531f.)

⁵⁸⁸ Wolfgang Streeck, Gewerkschaften zwischen Nationalstaat und Europäischer Union, Max-Planck-Institut für Gesellschaftsforschung Working Paper 96/1, p. 3 (<http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp96-1/wp96-1.html>, last accessed April 7th, 2006); Paul Marginson,

labour in which they not only have to deal with their national employers but also have to pay attention to bargaining in the other member states.

A solution may lay in coordinated wage bargaining. Schulten explained that this strategy “assumes the continued existence of different national bargaining systems, but seeks to link them so as to limit national competition on pay and labour cost developments”⁵⁸⁹. In fact, forms of co-ordinated wage bargaining have long been practised in most industrial relations systems. An example is ‘pattern bargaining’, where the agreement reached in one sector (often metal industry) acts as an example for other sectors⁵⁹⁰.

The coordination of wage policies is an attempt by trade unions to agree upon a number of common ground-rules and aim for wage policies in the respective national states, thus trying to prevent “competitive underbidding of labour costs and wage dumping”⁵⁹¹. While the need for a European wage policy has increased with the introduction of the Euro, increasing European integration and coordination of politics and economy had made it clear earlier that purely national strategies of unions were not sufficient any more⁵⁹². The demise of national solidaristic wage policy due to increased competition between member states in the wake of European integration makes it necessary for unions to regain part of their power to “place political limitations on competition over

Industrial Relations at European Sector Level: The Weak Link?, *in*: Economic and Industrial Democracy, Vol. 26, Issue 4, p. 511ff. (p. 523)..

⁵⁸⁹ Thorsten Schulten, quoted in: Paul Marginson, Industrial Relations at European Sector Level: The Weak Link?, *in*: Economic and Industrial Democracy, Vol. 26, Issue 4, p. 511ff. (p. 523).

⁵⁹⁰ Keith Sisson, Paul Marginson, Co-Ordinated Bargaining: A Process for our times?, *in*: British Journal of Industrial Relations, Vo. 40, No. 2, p. 197ff. (p. 202, 205).

⁵⁹¹ Thorsten Schulten, Foundations and Perspectives of Trade Union Wage Policy in Europe, WSI-Discussionspaper No 129, August 2004, p. 2.

⁵⁹² Thorsten Schulten, Foundations and Perspectives of Trade Union Wage Policy in Europe, WSI-Discussionspaper No 129, August 2004, p. 2.

wages and labour costs” on European level⁵⁹³.

Coordinated bargaining does not mean bargaining on a European level; rather, it encompasses the coordination of national bargaining policies on a European scale. Coordination does not mean a fixed set of inflexible rules; rather it shall be achieved by “consultation and mutual agreement on shared guidelines and targets”. In this way a European race to the bottom shall be prevented by giving up “trying to obtain national competitive advantages on the expense of neighbouring countries by means of wage restraint”⁵⁹⁴.

Coordinated bargaining basically takes place on three levels: the interregional level, involving only a limited number of countries; the sectoral level, coordinated by the European Industry Federations and the cross-sectoral level, coordinated by the ETUC⁵⁹⁵.

Advantages

One of the most obvious reasons for coordinated wage bargaining is the absence of collective agreements on the European level. The social dialogue, even though it does bring employers’ organisations and unions together on that level, has its weaknesses and

⁵⁹³ Thorsten Schulten, Foundations and Perspectives of Trade Union Wage Policy in Europe, WSI-Discussionspaper No 129, August 2004, p. 5, 10f.

“Solidaristic wage policy” works on the assumption that the “price for labour is not set by supply and demand, as it is for a regular commodity, but instead by collective agreements, which are themselves the result of political struggles and regulation”. Goals of solidaristic wage policy include the aim that workers doing the same job should be paid the same, no matter the economic situation of their employer. In addition to trying to fight wage discrimination for groups like women or migrant workers, solidaristic wage policy is aiming “at reducing overall wage differential between the different groups of employees in order to get a more egalitarian wage structure”. (Schulten, cit. opp., p. 3f.).

⁵⁹⁴ Thorsten Schulten, Foundations and Perspectives of Trade Union Wage Policy in Europe, WSI-Discussionspaper No 129, August 2004, p. 13f.

⁵⁹⁵ Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p.5.

furthermore does not deal with wage and other core issues of national collective bargaining. Coordinated bargaining may fill this gap⁵⁹⁶.

Another reason for a coordination of wage policies is that bargaining power in relation to employers may be enhanced⁵⁹⁷. When employers are faced with similar demands all over Europe, the incentive to relocate is weakened and no European country will have a competitive advantage due to low wages/labour costs. This, in a way, might pose a balance against economic integration and internationalisation on the employers' side⁵⁹⁸.

The idea to coordinate bargaining has the advantage of taking into account the differences between the national bargaining systems instead of trying to impose a centralised European system. Furthermore, the antagonism between national and European level bargaining is avoided by implementing national bargaining into a European strategy, strengthening unions' position on a national as well as a European level by connecting national policies. Additionally, it recognises the fact that European level bargaining is unlikely to come forth as long as the employers' side refuses to engage in negotiations. Furthermore, a coordinated bargaining policy might just be the new movement "capable of independent action" trade unions are looking for on European level in order to attract new members⁵⁹⁹.

Finally, coordinating wage bargaining by use of the widespread wage formulas would enable unions to "take wages out of competition" – those formulas link wages to

⁵⁹⁶ Paul Marginson, Industrial Relations at European Sector Level: The Weak Link?, *in*: Economic and Industrial Democracy, Vol. 26, Issue 4, p. 511ff. (p. 523, 535).

⁵⁹⁷ Alain Borghijs, Sjef Ederveen, Ruud de Mooij, European Wage Coordination: Nightmare or Dream to come true?, European Network of Economy Policy Research Institutes, Working Paper No. 20/May 2003, p. 23.

⁵⁹⁸ Alain Borghijs, Sjef Ederveen, Ruud de Mooij, European Wage Coordination: Nightmare or Dream to come true?, European Network of Economy Policy Research Institutes, Working Paper No. 20/May 2003, p. 23.

⁵⁹⁹ Thorsten Schulten, Foundations and Perspectives of Trade Union Wage Policy in Europe, WSI-Discussionspaper No 129, August 2004, p. 15.

productivity and, if adhered to in all member states, wages therefore would have no effect on competitiveness anymore⁶⁰⁰.

Feasibility

Different steps have already been taken. On the interregional cross-sectoral level, there is the so-called *Doorn-Initiative* of trade union confederations and important sectoral unions; concluded in 1998 between Germany, the Netherlands, Belgium and Luxembourg, it was the first compilation of transnational rules for collective bargaining strategies⁶⁰¹. The background to the initiative is the fact that Belgian unions had to deal with a “law on competitiveness” (inspired by Belgium’s aim to meet the criteria for participation in the EMU) which introduced a “legal wage norm” limiting the wage increases by collective agreements to the average of those expected in Belgium’s main trading partners - France, the Netherlands and Germany. Belgian unions therefore invited German and Dutch unions to a seminar in 1997 in which the decision was made to hold regular meetings to exchange information on bargaining matters⁶⁰².

In the next meeting at the Dutch town of Doorn in 1998 a declaration was adopted, committing “the unions to a bargaining coordination rule under which negotiators should aim for settlements consistent with the increase in the cost of living plus the

⁶⁰⁰ Thorsten Schulten, *Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy*, WSI Discussion Paper No. 101, Düsseldorf 2002, p.22.

⁶⁰¹ Paul Marginson, *Industrial Relations at European Sector Level: The Weak Link?*, in: *Economic and Industrial Democracy*, Vol. 26, Issue 4, p. 511ff. (p. 524); Thorsten Schulten, *Foundations and Perspectives of Trade Union Wage Policy in Europe*, WSI-Discussionspaper No 129, August 2004, p. 12.

⁶⁰² Thorsten Schulten, *Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy*, WSI Discussion Paper No. 101, Düsseldorf 2002, p.7; eiro online, *The Europeanisation of Collective Bargaining*, <http://www.eiro.eurofound.eu.int/print/1999/07/study/tn9907201s.html>, last accessed April 12th, 2006.

increase in labour productivity”⁶⁰³. Furthermore, the declaration stated that

“the participating trade unions aim to achieve both the strengthening of mass-purchasing power and employment-creating measures (e.g. shorter work times); the participating organisations will regularly inform and consult each other on developments in bargaining policy”⁶⁰⁴.

In later meetings, the scope was extended to frame strategies for the establishment of common standards on non-wage issues, e.g. life-long learning. Comprising all major trade union confederations plus the major affiliated industry federations from the participating countries, the cooperation is enhanced by information exchange between experts in between annual meetings, enabling supervision of national agreements⁶⁰⁵. Additionally, participating federations also commit themselves to “rejecting demands for any national policy of wage restraint aimed at securing cost advantages in competition with neighbouring countries”⁶⁰⁶, thus producing a clear refusal of “competitive corporatism”.

However, the Doorn Initiative, although widely discussed, has remained a single phenomenon⁶⁰⁷.

⁶⁰³ Paul Marginson, Industrial Relations at European Sector Level: The Weak Link?, *in*: Economic and Industrial Democracy, Vol. 26, Issue 4, p. 511ff. (p. 524); Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p.6.

⁶⁰⁴ Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p.7.

⁶⁰⁵ Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p.6; Paul Marginson, Industrial Relations at European Sector Level: The Weak Link?, *in*: Economic and Industrial Democracy, Vol. 26, Issue 4, p. 511ff. (p. 524).

⁶⁰⁶ eiro online, The Europeanisation of Collective Bargaining, <http://www.eiro.eurofound.eu.int/print/1999/07/study/tn9907201s.html>, last accessed April 12th, 2006.

⁶⁰⁷ Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper

Other initiatives mostly take place at the sectoral level, predominantly in metalworking and construction. There is a strong regional concentration; coordination mainly takes place between Germany and neighbouring countries, especially Benelux, on the one hand, and between the Scandinavian countries on the other. For example, there are different interregional networks between the German unions in metalworking, IG Metall, and construction, IG BAU and respective unions in neighbouring states. IG Metall has adopted a nationwide policy for cross-border collective bargaining at interregional levels, stating in their 1999 “European policy demands” that “each district shall develop collective bargaining relations with the unions of neighbouring countries which range from mutual participation in each others’ collective bargaining to joint planning”⁶⁰⁸.

The cooperation between the IG Metall in Nordrhein-Westfalen (comprising the former heavy industry region Ruhrdistrict), Belgium and the Netherlands is arguably one of the most advanced and covers, *inter alia*, supervision of agreements on basis of the bargaining coordination rule of the European Metalworkers’ Federation (EMF)⁶⁰⁹. Other networks, like that between IG Metall in Lower Saxony and Amicus-AEEU in the UK, consist mainly of visits, combined seminars and exchange of information⁶¹⁰.

On the sectoral level, most European Industrial Federations (EIFs)⁶¹¹ have started to

No. 101, Düsseldorf 2002, p.8.

⁶⁰⁸ Thorsten Schulten, *Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy*, WSI Discussion Paper No. 101, Düsseldorf 2002, p.8.

⁶⁰⁹ Paul Marginson, *Industrial Relations at European Sector Level: The Weak Link?*, *in*: *Economic and Industrial Democracy*, Vol. 26, Issue 4, p. 511ff. (p. 525).

⁶¹⁰ Paul Marginson, *Industrial Relations at European Sector Level: The Weak Link?*, *in*: *Economic and Industrial Democracy*, Vol. 26, Issue 4, p. 511ff. (p. 525).

⁶¹¹ The EIFs are organisations of trade unions within one or more sectors, representing workers;

organise the sectoral bargaining policies of their affiliated national unions on a European level. The bargaining coordination policy of the EMF is “the longest established, the most developed and widely regarded as the pacesetter”. It held its first collective bargaining conference in 1993, and adopted a rule for wage negotiations in 1998, which held that “settlement should be equivalent to the cost of living plus a balanced share of economy-wide productivity gains”. A number of other EIFs in the manufacturing sector have adopted similar rules. The EMF has also adopted a working time charter which stipulates a yearly maximum of 1750 hours plus a maximum of 100 hours overtime. While the EMF strategy comprises two elements, “a joint commitment to European guidelines for national collective bargaining which should prevent downward competition” and “the political determination of ‘EMF minimum standards’ which all EMF affiliates should feel obliged to bargain for”, national unions keep full autonomy of how to set their priorities within these guidelines⁶¹².

Generally, the standards set by the EMF are determined according to a common strategy. First, the unions try to determine a collective standard they feel is appropriate. This should neither be the lowest standard nor the European average, for then coordination would only try to ensure that the countries with the lowest standards are catching up. Therefore, the minimum is combined with more far-reaching goals⁶¹³.

interests on European level, principally by negotiation.

(European Industrial Relations Dictionary, European Industry Federations,

<http://www.eurofound.eu.int/areas/industrialrelations/dictionary/definitions/EUROPEANINDUSTRIYFEDERATIONS.htm>, last accessed May 2nd, 2006).

⁶¹² Paul Marginson, Industrial Relations at European Sector Level: The Weak Link?, *in*: Economic and Industrial Democracy, Vol. 26, Issue 4, p. 511ff. (p. 528f.); Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p.11ff.

⁶¹³ Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p.11ff; Paul Marginson, Industrial Relations at European Sector Level: The Weak Link?, *in*: Economic and Industrial Democracy, Vol. 26, Issue 4, p. 511ff. (p. 528f.).

There are great differences between initiatives in the individual sectors. Some, for example in finance, are voluntary, some, like the EMF's, are more formal. Most are single tier, that is, they mainly deal with sector level negotiations on the national scale (for example the EMF's), while others, for example UNI-Europa Finance's, are double tier, acting on company as well as sectoral level, thereby embracing EWCs. UNI-Europa Finance is also acting in more than one sector. More importantly, there are differences in the power to implement and monitor the initiatives. Many EIFs lack the structures necessary to assist coordination of bargaining while others, such as UNI-Europa Finance, have set up websites including "databases of the contents of collective agreements and key wage and working time parameters"⁶¹⁴. Additionally, EIFs in sectors that are already experiencing a common labour market, like construction, tend to put more emphasis on lobbying for European social legislation since the impression is that the social problems brought about by the integrated market cannot be dealt with by the unions alone⁶¹⁵.

The ETUC started working on coordination on a cross-sectoral level in 2000, declaring in 1999 the

"coordination of collective bargaining – along with European social policy legislation, the European Social Dialogue, and the European Works Councils – as one of the four pillars of a 'European system of labour relations'".

⁶¹⁴ Paul Marginson, Industrial Relations at European Sector Level: The Weak Link?, *in*: Economic and Industrial Democracy, Vol. 26, Issue 4, p. 511ff. (p. 528f.); Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p. 17.

⁶¹⁵ Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p. 20.

It laid out that coordinated bargaining was to be oriented along a “European solidaristic pay policy” and thus should be in a position to

“guarantee workers a fair share of income; counter the dangers of social dumping; counter the growing income inequality in some countries; contribute to a reduction in disparities in living conditions; and contribute to an effective implementation of the principle of equal treatment of the sexes”⁶¹⁶.

Before that, the ETUC had mostly been concerned with the social dialogue and only the development of cross-national initiatives like those of the EMF and the Doorn initiative and an increasing discussion within EU institutions on European macroeconomic, and therefore also wage, policy, subsequent to the introduction of the EMU, changed the focus to policies of coordination⁶¹⁷. However, even in its 1999 proposal the ETUC saw its position more behind the scene: “competent for overall co-ordination, providing the necessary framework to guarantee the overall coherence of the process”, relying on the European Industrial Federations to create “the requisite structures and instruments, adapted to the needs of the sector concerned”⁶¹⁸. In 2000, it adopted a European guideline for coordinated collective bargaining, advocating wage settlements that would mirror cost of living increases plus a share of productivity gains – similar to the guidelines of the Doorn Initiative. Other intentions include a narrowing of the “gender pay gap” and a decrease in the number of the low-paid. Also included is a monitoring

⁶¹⁶ Thorsten Schulten, Foundations and Perspectives of Trade Union Wage Policy in Europe, WSI-Discussionspaper No 129, August 2004, p. 12f.; Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p.21.

⁶¹⁷ Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p.21.

⁶¹⁸ ETUC, quoted in: Keith Sisson, Paul Marginson, Co-Ordinated Bargaining: A Process for our Times?, in: British Journal of Industrial Relations, Vo. 40, No. 2, p. 197ff. (p. 198).

system for agreements⁶¹⁹.

However, there are - of course – a number of problems. First, coordinated bargaining has no means of forcing the participants to actually adhere to the agreed guidelines. Since ‘bindingness’ is one of the most important organisational means for unions in their fight against competition aiming at the destruction of solidarity, this might be less than ideal. Secondly, since unions are still mostly acting on a national level, authority of the European Federations is rather weak. And of course, the more national unions fail to follow the guidelines, the greater the pressure for the rest to depart from the agreed rules as well⁶²⁰. In fact, the EMF asserts that every year a number of national federations do not achieve settlements according to the rule; furthermore, it also states that it did not take a prominent place among negotiation priorities in many national unions⁶²¹.

Tied to this is the phenomenon that national unions might not *want* to adhere to the guidelines. “Competitive corporatism” tries to clamp collective bargaining into politics of national competitiveness, typically calling for wage restraints in collective agreements with the aim of enhancing national competitiveness. Quite often at the end of the 1990s, those pacts were justified with the need to meet EMU criteria. If unions support such a strategy (or are too weak to resist it), there is not much that can be done, due to the voluntaristic nature of the coordination approach. For example, bargaining

⁶¹⁹ Paul Marginson, Industrial Relations at European Sector Level: The Weak Link?, *in*: Economic and Industrial Democracy, Vol. 26, Issue 4, p. 511ff. (p. 530).

⁶²⁰ Thorsten Schulten, Foundations and Perspectives of Trade Union Wage Policy in Europe, WSI-Discussionspaper No 129, August 2004, p. 16; Wolfgang Streeck, Gewerkschaften zwischen Nationalstaat und Europäischer Union, Max-Planck-Institut für Gesellschaftsforschung Working Paper 96/1, p. 16 (<http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp96-1/wp96-1.html>, last accessed April 7th, 2006); Paul Marginson, Industrial Relations at European Sector Level: The Weak Link?, *in*: Economic and Industrial Democracy, Vol. 26, Issue 4, p. 511ff. (p. 531f.).

⁶²¹ Paul Marginson, Industrial Relations at European Sector Level: The Weak Link?, *in*: Economic and Industrial Democracy, Vol. 26, Issue 4, p. 511ff. (p. 532).

rounds in Germany in 2000 and 2001 have been heavily influenced by the national “*Bündnis für Arbeit*”⁶²² that definitely did not meet the standards laid down by the guidelines⁶²³. Another problem lies on the national level: it is doubtful whether trade unions actually have the power to reach agreements in national negotiations conforming to the guidelines. In addition, employers clearly prefer a decentralisation of collective bargaining to company level and are therefore unwilling to participate in coordination efforts. National bargaining systems are also still very diverse and coordinated bargaining policy basically demands national negotiations on the national or regional level – something that is rather uncommon in the UK, and also the German DGB has no bargaining power⁶²⁴.

Additionally, coordinated wage bargaining is a rather defensive concept. While it might succeed in taking wages out of competition, it does not challenge the status quo of distribution – neither between capital and labour, nor between different groups of workers⁶²⁵. It is held elsewhere in this chapter that unions need to develop a vision to attract new members. It is debatable if a strategy that basically perpetuated the status quo qualifies as “vision” and helps with attracting workers.

⁶²² Alliance for Jobs

⁶²³ Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p.25; eiro online, The Europeanisation of Collective Bargaining, <http://www.eiro.eurofound.eu.int/print/1999/07/study/tn9907201s.html>, last accessed April 12th, 2006.

⁶²⁴ Thorsten Schulten, Foundations and Perspectives of Trade Union Wage Policy in Europe, WSI-Discussionspaper No 129, August 2004, p. 16f; Paul Marginson, Industrial Relations at European Sector Level: The Weak Link?, in: Economic and Industrial Democracy, Vol. 26, Issue 4, p. 511ff. (p. 523).

⁶²⁵ Thorsten Schulten, Europeanisation of Collective Bargaining – An Overview on Trade Union Initiatives for a Transnational Coordination of Collective Bargaining Policy, WSI Discussion Paper No. 101, Düsseldorf 2002, p.23.

On a more basic level, finding a standard all participants can adhere to has proved to be difficult. When the EMF adopted its guideline about working time, there was a “heated debate” on the question whether the aim should be expressed in hours per week or per year, with some unions even arguing for a daily figure. When the decision for a yearly figure was taken, the next problem was where to set the standard. Taking the lowest standard present between the member states would have meant giving up on the idea of advancing social standards while taking the highest standard would have been not feasible in a number of countries. The result was a figure “somewhere in the middle”⁶²⁶. Of course, outcomes like this, while preventing social dumping, do little to better conditions in the more advanced member states.

Connected to this is the fact that it seems that national issues, problems and preferences remain the most important determinants in bargaining strategies, so that it appears as if the initiatives will merely succeed in making national actors aware of an international context of bargaining⁶²⁷.

Trade union practices are rather diverse within Europe in regard to matters such as timing of wage bargaining and the way unions engage in national policy discussions. Furthermore, not only do practices differ, the systems themselves are rather diverse, too. For example, sector level bargaining is prevalent in Germany, while company level bargaining is standard in the UK. Such differences might make coordination more complex.

Legal environments are also fairly varied in Europe. Different member states have different (or no) regulations regarding minimum wages, unemployment benefits, employment protection and taxation. All those will need to be taken into account when

⁶²⁶ Paul Marginson, *Industrial Relations at European Sector Level: The Weak Link?*, in: *Economic and Industrial Democracy*, Vol. 26, Issue 4, p. 511ff. (p. 530).

⁶²⁷ Paul Marginson, *Industrial Relations at European Sector Level: The Weak Link?*, in: *Economic and Industrial Democracy*, Vol. 26, Issue 4, p. 511ff. (p. 533).

coordinating wages policies and all those will make coordination, or even just agreeing on a combined program, more difficult⁶²⁸.

Finally, the weakness of the European organisations of employers and unions, already addressed within the discussion of the Social Dialogue, poses another problem for coordinated bargaining, making it more difficult for them to develop meaningful coordination strategies, or, if successful in that, to impose them on the national affiliates – although weakness (and unwillingness) on employers' side is not that important for unions since one advantage of coordinated bargaining is that it can be done unilateral⁶²⁹.

Even though full-blown wage coordination might not have developed yet, unions have taken steps toward it. However, the process is much splintered: “hardly evident in some sectors, emergent in others and approaching a practical reality in a few”⁶³⁰, leading to “multi-speed Europeanization”⁶³¹. For example, unions may discuss their strategies with one another, and sometimes stipulate criteria they are going to follow in negotiations. All this is, however, purely voluntary. Also, the ETUC is proposing guidelines for wage bargaining, for example holding that “the rise in wages should equal the rate of inflation

⁶²⁸ Alain Borghijs, Sjef Ederveen, Ruud de Mooij, *European Wage Coordination: Nightmare or Dream to come true?*, European Network of Economy Policy Research Institutes, Working Paper No. 20/May 2003, p. 23f; Paul Marginson, *Industrial Relations at European Sector Level: The Weak Link?*, *in: Economic and Industrial Democracy*, Vol. 26, Issue 4, p. 511ff. (p. 531).

It has also been shown that coordination might be detrimental for unions in less competitive countries in cases where labour market conditions are fairly different between the countries involved. (Borghijs, Ederveen and de Mooij, *cit. opp.*, p. 24).

⁶²⁹ Keith Sisson, Paul Marginson, *Co-Ordinated Bargaining: A Process for our times?*, *in: British Journal of Industrial Relations*, Vo. 40, No. 2, p. 197ff. (p. 212).

⁶³⁰ Paul Marginson, *Industrial Relations at European Sector Level: The Weak Link?*, *in: Economic and Industrial Democracy*, Vol. 26, Issue 4, p. 511ff. (p. 532).

⁶³¹ Keith Sisson, Paul Marginson, *Co-Ordinated Bargaining: A Process for our times?*, *in: British Journal of Industrial Relations*, Vo. 40, No. 2, p. 197ff. (p. 213).

plus the gains in productivity, possibly corrected for developments in other determinants”⁶³².

Conclusion

The situation for trade unions on the European level looks rather bleak. Neither the ETUC nor the social dialogue has yet managed to emerge as a powerful representative of labour. While there are movements towards trade union policies on a European level, these are developing at different speeds and intensities⁶³³. However, as has been shown above, the potential to gain greater influence is there. It seems important that the ETUC gets into closer contact with its constituents. A re-valuation of the Social Dialogue also seems promising.

For individual unions, coordinated wage bargaining and individual transnational co-operations seem like a good way to deal with Europe. While there are serious obstacles to mount before a meaningful coordinated wage policy will emerge, the concept is promising. Not only will coordinated bargaining help fight social dumping, it might also lead to a greater coordination of unions and therefore to a true European agenda of these still most important actors in industrial relations.

Unions could try and make more use of the structures provided by the EWCs for

⁶³² Alain Borghijs, Sjef Ederveen, Ruud de Mooij, European Wage Coordination: Nightmare or Dream to come true?, European Network of Economy Policy Research Institutes, Working Paper No. 20/May 2003, p. 25.

⁶³³ eiro online, The Europeanisation of Collective Bargaining, <http://www.eiro.eurofound.eu.int/print/1999/07/study/tn9907201s.html>, last accessed April 12th, 2006

information exchange⁶³⁴. while it in particular depends on reliable information⁶³⁵, but, while many EWCs are explicitly prevented from dealing with issues like wages and conditions, studies also suggested that employees use the EWCs rather to enhance the position of their company in the internal competition within MNCs⁶³⁶ – a form of *Betriebsegoismus* that can also be observed in the case of works councils in Germany (see Chapter IV). Integrating EWCs in a strategy of international coordination could counteract this tendency. Furthermore, unions should try to develop some meaningful ways of securing compliance with agreed guidelines in order to make coordinated bargaining more effective.

Part III – Problems on a global Scale

While “Globalisation” by now may appear like a catchword to either mourn or rectify all that happens in national economy, it indeed is a major source of concern for unions. More and more companies decide to relocate part of their enterprises abroad where labour is cheap⁶³⁷. National unions therefore are confronted with extra-national

⁶³⁴ Different reasons have been brought forth for the failure of unions to make use of the international structures provided by the EWCs: for once, cultural, language and organisational barriers probably play a role; however, more important might be the identity of EWCs in a competing system. As company-based institutions their emphasis is on “short-term local activities”; leading to rivalry rather than solidarity.

(Bob Hancke, European Works Councils and the Industrial Restructuring in the European Motor Industry, *in*: European Journal of Industrial Relations, Vol. 6, No. 1, p. 35ff. (p. 38f.).)

⁶³⁵ Keith Sisson, Paul Marginson, Co-Ordinated Bargaining: A Process for our times?, *in*: British Journal of Industrial Relations, Vo. 40, No. 2, p. 197ff. (p. 204).

⁶³⁶ eiro online, The Europeanisation of Collective Bargaining, <http://www.eiro.eurofound.eu.int/print/1999/07/study/tn9907201s.html>, last accessed April 12th, 2006; Keith Sisson, Paul Marginson, Co-Ordinated Bargaining: A Process for our Times?, *in*: British Journal of Industrial Relations, Vo. 40, No. 2, p. 197ff. (p. 211).

⁶³⁷ It has been suggested from various sides that labour costs actually only play a limited role when it comes to the decision of where to set up a production site. Labour cost is the more comprehensive

competition of “low-cost” employees they are helpless to fight with national measures. Furthermore, unions' or works councils' influence diminishes when major decisions affecting their members/constituents are made in headquarters in a distant country where there is no way of having an impact.

However, growing internationalisation also makes companies more vulnerable and this could be a chance for unions. For example, multinational companies rely on their supply chains of regional production. This renders them more susceptible to interruptions, opening up opportunities for industrial action: “If labour were to disrupt operations at a single plant, the entire supply chain would be affected, assuming that production could

term than wage cost, including the costs of accidents, costs of hiring replacement workers and so on. Employers in countries that have no legislation requiring the employer to compensate workers for accidents are facing therefore cheaper labour costs, even though wages might be higher.

(John Hendy, *International Trade and International Trade Union Rights*, in: Aileen McColgan (Ed.), *The Future of Labour Law*, London 1996, p. 85ff. (p. 95).)

The United National Conference on Trade and Development, for example, stated in its Investment report for 1994 that

“despite a few notable cases, transnational corporations do not often close down, on account of low labour cost considerations alone, production facilities in one country to re-establish them in another country ... Broader and more important macroeconomic and cyclical factors, technological change and labour market inflexibilities are the principal influences on the growth and distribution of employment.”

(UNCTAD World Investment Report for 1994, as cited by Patrick Macklem, *Labour Law beyond Borders*, in: *Journal of International Economic Law* 2002, Vol. 5, p. 605ff.

Research has also indicated that low labour costs are balanced by low productivity, so that over-all production costs in western and developing countries are fairly similar; consequently, “enterprises are not likely to relocate to another state with lower nominal labour costs if there costs simply reflect lower productivity of workers in that state”. Productivity in facts benefits from the observance of core labour standards, another incentive for countries to adhere to the standards set by the ILO.

(Bob Hepple, as cited by Patrick Macklem, *Labour Law beyond Borders*, in: *Journal of International Economic Law* 2002, Vol. 5, p. 605ff.; Patrick Macklem, *Labour Law beyond Borders*, in: *Journal of International Economic Law* 2002, Vol. 5, p. 605ff.)

For western trade unions this might serve as an argument against relocations, which do take place, even if labour costs play only a limited role.

not be switched from the affected plant to another”⁶³⁸.

It therefore seems inescapable that unions (or labour more generally) get organised on an international scale. Different attempts have already been made and I will deal in more detail with two of them below.

International Labour Organisation - ILO⁶³⁹

The ILO was founded in 1919 to “promote social justice and thus contribute to

⁶³⁸ Jeremy Waddington, *Situating Labour within the Globalization Debate*, in: Jeremy Waddington (Ed.), *Globalization and Patterns of Labour Resistance*, London 1999, p. 1ff. (p. 11).

⁶³⁹ Already early in the industrial revolution reformers trying to better the situation of workers realised the need to establish minimum standards of work that would be applicable worldwide, since otherwise countries who did adopt such legislation would endure a competitive disadvantage; furthermore, merely national legislation could also lead to increased unemployment since consumers would prefer cheaper foreign goods over more expensive national ones. Over the following decades the idea of an international regulation of labour issues never quite died down and was proposed by several governments – for it had been realised that intergovernmental action was necessary to achieve any results.

The International Association for Labour Legislation was set up in Paris in 1900 and succeeded in adopting Conventions that rendered night work of women and the use of white phosphorus in match-fabrication illegal in 1906. Even though the association suffered a quick defeat at the hands of World War I, it provided valuable experiences for the setting up of the International Labour Organisation (ILO) in 1919.

Another important influence was the International Workers’ Movement. As will be detailed below, the International Federation of Trade Unions was set up in 1898. During war time, several international meetings of trade unions took place. Additionally, in many warring nations relationships between employers, workers and government had changed: wartime economy had made it necessary for governments to consult with employers’ and workers’ organisations, thus bringing those organisations into closer cooperation with government. As a result governments not only became more aware of the views of employers and workers, they also tended to view them more benevolently; leading to a greater understanding for the need to an international regulation of labour issues.

(Antony Alcock, *History of the International Labour Organisation*, London 1971, p. 5; G. A. Johnston, *The International Labour Organisation – Its Work for Social and Economic Progress*, London 1970, p. 5ff).

universal and lasting peace”⁶⁴⁰. An outflow of the peace Conference at the end of the First World War, its constitution and labour principles are embodied in the treaty of Versailles⁶⁴¹. Set up under the League of Nations (subsequently surviving it to become part of the UNO), it features a tripartite structure by encompassing labour and employer organisations as well as government representatives. Its duties and responsibilities are “to establish international labour standards in the form of Conventions, to persuade states to join these Conventions, and to resolve disputes concerning their implementation”⁶⁴². Today almost all states are members and the ILO is mostly concerned with assuring human rights in the employment relationship, trying to set international applicable standards by decreeing recommendations, resolutions and conventions. While members are expected to adhere to the standards set out in recommendations and resolutions under domestic and international law, those are not binding. However, they do provide a basic set of labour standards. Conventions, on the other hand, are binding at international law for all those states that have ratified them; their domestic effect depends on the national law of the state in question⁶⁴³.

While the Conventions

“include powerful statements concerning rights to freedom of assembly, to join unions, and engage in collective bargaining, as well as setting standards dealing with important issues such as child and forced labour and the prohibition of sex

⁶⁴⁰ International Labour Organisation, *Übereinkommen und Empfehlungen 1919 – 1991*, Band II (1967 – 1991), angenommen von der Internationalen Arbeitskonferenz, 51. bis 78. Tagung, Genf 1991.

⁶⁴¹ G. A. Johnston, *The International Labour Organisation – Its Work for Social and Economic Progress*, London 1970, p. 13.

⁶⁴² Christopher McCrudden, *A Perspective on Trade and Labour Rights*, in: *Journal of International Economic Law* 2000, p. 43ff.

⁶⁴³ Patrick Macklem, *Labour Law beyond Borders*, in: *Journal of International Economic Law* 2002, Vol. 5, p. 605ff.

discrimination”⁶⁴⁴;

the ILO lacks effective means to enforce these standards⁶⁴⁵, even though several mechanism are available to ensure that countries comply with them. It maintains a monitoring procedure; however, this seems not to be interested in the reasons states may have for non-compliance nor does it take into account the different stages of economic development. This state-focused system of monitoring is also ill-equipped to deal with transnational companies. Therefore, it has been held that the ILO “relies, largely, on moral suasion and diplomatic pressure”. However, its very success in setting labour standards may – ironically – at least be partly attributable to its lack of coercive authority⁶⁴⁶.

Another point of criticism is the composition of the ILO. It has been held that the (labour) interests represented are too narrow, leaving out those most needy of representation and most likely to suffer from the effect of globalisation: the poor, those not organised, belonging to a minority group or being female⁶⁴⁷.

In 1998, the ILO adopted a Declaration on core labour rights, addressing child and forced labour, freedom of association, collective bargaining and freedom from

⁶⁴⁴ James Atleson, *The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law*, in: Joanne Conaghan, Richard Michael Fischl, Karl Klare (Eds.), *Labour Law in an Era of Globalization*, Oxford 2002, p. 379ff. (p. 381).

⁶⁴⁵ James Atleson, *The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law*, in: Joanne Conaghan, Richard Michael Fischl, Karl Klare (Eds.), *Labour Law in an Era of Globalization*, Oxford 2002, p. 379ff. (p. 381).

⁶⁴⁶ Christopher McCrudden, *A Perspective on Trade and Labour Rights*, in: *Journal of International Economic Law* 2000, p. 43ff.; Patrick Macklem, *Labour Law Beyond Borders*, in: *Journal of International Economic Law* 2002, Vol. 5, p. 605ff.

⁶⁴⁷ Christopher McCrudden, *A Perspective on Trade and Labour Rights*, in: *Journal of International Economic Law* 2000, p. 43ff.; Patrick Macklem, *Labour Law Beyond Borders*, in: *Journal of International Economic Law* 2002, Vol. 5, p. 605ff.

discrimination, but neither minimum age nor maximum hours⁶⁴⁸. This declaration puts an international obligation on all member states to respect the rights contained; furthermore, membership itself is grounded on an obligation to secure core labour rights (most of present day states are members). The Declaration might therefore be compared to customary international law⁶⁴⁹. While these rights are of great importance to better the situation of workers in developing countries, they provide a form of “lowest common denominator”⁶⁵⁰ and thus do little in addressing the problems arising from globalisation for workers in western states. Still, this declaration – if adhered to – will put an end to the worst outgrowths of exploitation of labour in developing countries.

Western trade unions could lobby for an ILO Convention that would address the right of workers to a “living wage” – this would not only benefit workers exploited in developing countries but also those in the west competing against cheap labour. However, it has to be kept in mind that even a “living wage” in a developing country would be far below western standards; so an incentive for employers to relocate might remain. In fact, it might even be considered unfair to rob those countries of one of the few attractions they can offer to foreign investors (and thus robbing their inhabitants of employment opportunities by imposing a living wage to western standards).

⁶⁴⁸ Christopher McCrudden, A Perspective on Trade and Labour Rights, *in*: Journal of International Economic Law 2000, p. 43ff.; Patrick Macklem, Labour Law Beyond Borders, *in*: Journal of International Economic Law 2002, Vol. 5, p. 605ff.

However, even the determination of a minimum wage would not necessarily protect western employees from outsourcing, since such a wage would still be markedly lower than western or European standards.

⁶⁴⁹ Patrick Macklem, Labour Law Beyond Borders, *in*: Journal of International Economic Law 2002, Vol. 5, p. 605ff.

⁶⁵⁰ Patrick Macklem, Labour Law beyond Borders, *in*: Journal of International Economic Law 2002, Vol. 5, p. 605ff.

Another option for trade unions might be to lobby companies for corporate codes of conduct, but those are not only entirely voluntary but also generally of a lower standard than, for instance, those laid down in the core Conventions of the ILO and basically none lays down the obligation to pay a “living wage”⁶⁵¹.

International Confederation of Free Trade Unions

Since employers are increasingly acting on an international scale, it seems paramount that unions do so as well in order to exert influence on that level and deter employers from playing workers of different countries off against each other⁶⁵².

The International Confederation of Free Trade Unions (ICFTU) was founded in 1949⁶⁵³

⁶⁵¹ Patrick Macklem, *Labour Law Beyond Borders*, in: *Journal of International Economic Law* 2002, Vol. 5, p. 605ff.

⁶⁵² It has been argued that employers in multinational companies successfully managed to play workers in different parts of the world off against each other, thereby preventing the development of international solidarity. This is consistent with the observation that workers in developing countries, working for poverty wages, are perceived more as a threat than an object of solidarity in the west. However once channelled in a different direction, this fear might be brought to good use: the actions in the EU to ‘social dumping’ are nothing more than the fear to lose jobs to areas with cheap labour. (Harvie Ramsay, *In Search of International Union Theory*, in: Jeremy Waddington (Ed.), *Globalization and Patterns of Labour Resistance*, London 1999, p. 192ff. (p. 199, 202).).

⁶⁵³ A harbinger of today’s organisation can be found in the International Working Men’s Association, London 1864, the first international federation of workers: “this Association held its first meeting at Geneva in 1866, and adopted a number of resolutions significant for the early formulation of principles which were subsequently incorporated in international conventions.” In 1898 the International Federation of Trade Unions was founded – “a loose federal organisation to which the central trade union organisations of a number of important industrial countries were affiliated. With headquarters in Berlin, it held congresses in various European cities, at which resolutions were adopted relating to concrete aspects of the improvement of conditions of labour in the international bearings” (G. A. Johnston, *The International Labour Organisation – Its Work for Social and Economic Progress*, London 1970, p. 10).

and currently has 236 member organisations (it organises national trade union centres rather than individual unions) in 154 countries. It thus organises 155 million workers⁶⁵⁴.

International Transport Workers' Federation

Allied to the ICFTU is the International Transport Workers' Federation (ITF), founded 1869 in London. European seafarers' and dockers' unions found that they had to organise internationally to deal with strike breakers. Today, the ITF “organises workers in ships, ports, railways, road freight and passenger transport, inland waterways, fisheries, tourism and civil aviation” and “represents transport workers at world level and promotes their interests through global campaigning and solidarity”⁶⁵⁵.

The ITF carries out different campaigns, of which the struggle against “Flags of Convenience” (FOC) is not only the most prominent but also of the most interest in regard to unions' choices of action with respect to globalisation. The campaign aims at trying to hinder ship owners to run their vessels under flags of countries that offer only a minimum of regulations and thus no or hardly any protection of workers' rights, enabling owners to pay very low wages⁶⁵⁶. The ITF has taken on the task of organising and negotiation on behalf of crew members beyond national borders, thus virtually

⁶⁵⁴ ICFTU: What it is, what it does...

<http://www.icftu.org/displaydocument.asp?DocType=Overview&Index=990916422&Language=EN>, last accessed March 29th, 2006.

⁶⁵⁵ ITF Information Sheet, <http://www.itfglobal.org/about-us/whatis.cfm>, last accessed March 23rd, 2006.

⁶⁵⁶ ITF, Flags of Convenience Campaign, <http://www.itfglobal.org/flags-convenience/index.cfm>, last accessed March 23rd, 2006; ITF; What are Flags of Convenience, <http://www.itfglobal.org/flags-convenience/sub-page.cfm>, last accessed March 24th, 2006.

The situation of these ships, however, might be different from that of land-bound companies, since they have no ‘real nationality’ and therefore cannot be reached by national unions. For a ship apply the laws of the country of registration and since crews are often of a different nationality, their national governments or unions cannot help. Consequently most sailors on such ships are not trade union members, neither in their home country nor in the ship's country of register. (ITF, cit. opp.).

acting as a national union⁶⁵⁷.

The FOC-campaign consists of a political and an industrial arm. While the political part has as its aim to “establish by international governmental agreement a genuine link between the flag a ship flies and the nationality or residence of its owners, managers and seafarers”, the industrial part is concerned with the rights of seafarers working under flags of convenience⁶⁵⁸.

Since the ITF organises also dockers' unions it has been possible to enhance pressure on ship owners by organising industrial action in ports, this has been and still is vital for the success of the campaign⁶⁵⁹.

Despite the availability of cheap labour in abundance, the ITF has been relatively successful in obtaining better living and working conditions for seafarers. About 25% of all FOC ships employing about 90,000 seafarers are currently covered by ITF agreements, thus offering minimum standards to sailors. Those vessels are issued an ITF Blue Certificate⁶⁶⁰.

Even though it did not succeed in abolishing FOCs, the campaign still serves to show that international solidarity between trade unions may work: according to the ITF, “the industrial campaign has succeeded in enforcing decent minimum wages and conditions

⁶⁵⁷ ITF, Flags of Convenience Campaign, <http://www.itfglobal.org/flags-convenience/index.cfm>, last accessed March 23rd, 2006; ITF, What do FOCs mean to Seafarers?, <http://www.itfglobal.org/flags-convenience/flags-convenience-184.cfm>, last accessed March 24th, 2006.

⁶⁵⁸ ITF, Flags of Convenience Campaign, <http://www.itfglobal.org/flags-convenience/index.cfm>, last accessed March 23rd, 2006.

⁶⁵⁹ ITF, Flags of Convenience Campaign, <http://www.itfglobal.org/flags-convenience/index.cfm>, last accessed March 23rd, 2006.

⁶⁶⁰ ITF, Flags of Convenience Campaign, <http://www.itfglobal.org/flags-convenience/index.cfm>, last accessed March 23rd, 2006, Global Policy Forum, A Brief Guide to Flags of Convenience, <http://www.globalpolicy.org/nations/flags/guide.htm>, last accessed March 29th, 2006.

on board nearly 5,000 FOC ships”⁶⁶¹. It may serve as an example that it is possible to put pressure on employers who outsource and force them to offer decent working conditions⁶⁶².

International Metalworkers' Federation

Another interesting way to deal with globalisation has been taken by, among others, the International Metalworkers' Federation (IMF), organising more than 25 million blue- and white-collar workers in more than 200 unions in 100 countries in traditional steel and metal occupations, electrical jobs and electronics⁶⁶³. The IMF is concluding International Framework Agreements (IFA), that is, agreements negotiated on a global level between a transnational company and represented trade unions. Since the aim of an IFA is to ensure fundamental rights of workers in all of the company's branches, they are implemented locally under the involvement of local unions. Such an agreement will be geared to the standards set by the ILO, but normally also seeks to include a right to decent pay and working conditions. The “model international framework agreement” of the IMF thus not only contains a reference to the ILO standards by obligating the employer to guarantee freedom of association and respect the right to collective bargaining, but also requires him to pay “decent wages” that at least “meet basic needs of workers and their families and [...] provide some discretionary income”. Furthermore, he is required to assure that working hours are not excessive and working

⁶⁶¹ ITF, Flags of Convenience Campaign, <http://www.itfglobal.org/flags-convenience/index.cfm>, last accessed March 23rd, 2006.

⁶⁶² Of course – the minimum standards achieved by the ITF will probably be far below European standards.

⁶⁶³ IMF, About the IMF, <http://www.imfmetal.org/main/index.cfm?n=11&l=2> and <http://www.imfmetal.org/main/index.cfm?id=55&ol=2&l=2&c=2530>, both last accessed March 30th, 2006.

conditions are decent⁶⁶⁴. It not only puts obligations on the employer directly, but also requires him to ensure that his contractors and sub-contractors, principal suppliers and licensees observe the provisions of the agreement⁶⁶⁵. Agreements modelled on this framework agreement have been signed with Volkswagen, BMW, DaimlerChrysler, Renault, Indesit, Bosch and a number of other companies⁶⁶⁶.

The IMF holds that they are mutually beneficial – by concluding IFAs transnationals can secure good industrial relations and a positive public image⁶⁶⁷.

However, it is doubtful whether the prospect of “good industrial relations” is worth as much to transnational companies as the possibility to produce as cheap as possible. Especially in developing countries, employers will have no trouble in finding replacements for workers who are taking industrial action. A positive public image is mainly important in areas that are sensitive to consumer choice, notably textiles. In many other areas, including metalworking, seafaring and electronics, the public is much less well informed and, because those goods are higher priced to begin with, seems less to care about the circumstances under which they are produced⁶⁶⁸.

That said, IFAs are definitely a step in the right direction and those criticisms are rather applicable to the chances of getting a transnational to actually sign and obey by such an agreement than to the idea itself.

⁶⁶⁴ IMF; The Power of Framework Agreements, <http://www.imfmetal.org/main/files/ENG2.pdf>, last accessed March 30th, 2006; IMF Model International Framework Agreement, Provisions.

⁶⁶⁵ IMF Model International Framework Agreement, Preamble Sec. 4.

⁶⁶⁶ IMF Publications, <http://www.imfmetal.org/main/index.cfm?n=396&l=2>, last accessed March 30th 2006.

⁶⁶⁷ IMF; The Power of Framework Agreements, <http://www.imfmetal.org/main/files/ENG2.pdf>, p. 4, last accessed March 30th, 2006.

⁶⁶⁸ James Atleson, The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law, in: Joanne Conaghan, Richard Michael Fischl, Karl Klare (Eds.), Labour Law in an Era of Globalization, Oxford 2002, p. 379ff. (p. 382ff., 384).

International solidarity thus seems to be feasible and capable of bringing results, but it has to be kept in mind that even with IFAs wages in developing countries will still be far lower than those in the European Community, presenting an incentive to employers to relocate. While agreements like IFAs are important to secure decent conditions for workers in “cheap-labour” countries, they are probably less useful in protecting western workers from the negative effects of globalisation; that is mostly relocation of enterprises⁶⁶⁹.

In addition, international organisation of labour has to deal with a number of other obstacles, notably those put up by domestic law⁶⁷⁰. National law might prohibit solidarity or sympathy strikes and since it is often necessary for international campaigns to be successful to conduct industrial action also in areas not directly affected by the dispute, campaigns can be severely weakened by such laws⁶⁷¹. Lord Wedderburn

⁶⁶⁹ However, it has been argued above that wages are only a small factor in the decision to relocate, more important are the overall labour costs. Agreement that therefore try to secure decent conditions and fair treatment of workers in cases of dismissal, accidents and so on might therefore very well be able to help in getting employers think twice about relocating.

⁶⁷⁰ Other obstacles may lay in differences in language, culture and history.
James Atleson, *The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law*, in: Joanne Conaghan, Richard Michael Fischl, Karl Klare (Eds.), *Labour Law in an Era of Globalization*, Oxford 2002, p. 379ff (p. 399).

⁶⁷¹ James Atleson, *The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law*, in: Joanne Conaghan, Richard Michael Fischl, Karl Klare (Eds.), *Labour Law in an Era of Globalization*, Oxford 2002, p. 379ff. (p. 382ff., 384).

Atleson also provides an example for international action: When Liverpool dockers had been locked out, the dispute eventually reached international stage with the ITF launching a week of actions to which a great number of unions around the world signed on. Workers in the United States stayed off for a shift, many dockers worldwide refused to unload ships originating in Liverpool. There were direct and symbolic actions in more than 100 harbours; some ports in the US being entirely closed for up to 24 hours. The Liverpool dockers thus showed the vulnerability of international companies relying on this system of transportation and therefore the power transportation workers can exert in a globalised world.

Another example is the fate of the *Neptune Jade*: loaded in England during an industrial dispute, workers in ports in the United States, Canada and Japan refused to unload the ship, which sailed on to Taiwan where it was finally unloaded.

characterised the effects of these legislative obstacles to international action as “to fragment and inhibit trade union action while the power of internationalized capital is constitutionally guaranteed the maximum flexibility”⁶⁷².

Another problem might be the fact that sometimes even unions themselves might be adverse to international co-operation in an attempt to secure advantages for their national constituency in the international competition for production facilities. They might thus perceive workers in other countries as competitors rather than as potentially allies or at least as someone in the same situation⁶⁷³. This might especially be true of unions in developing countries whose main incentives to foreign investors are cheap labour and lax labour laws.

(Atleson, cit. opp. p. 382f.)

Under British law, industrial disputes are confined to “disputes between workers and their own employer and at their own place of work”. In Germany, strikes are only admissible when conducted with the aim to conclude a collective agreement, solidarity or sympathy strikes therefore are not allowed.

(Atleson, cit. opp., p. 384f, 396).

⁶⁷² James Atleson, *The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law*, in: Joanne Conaghan, Richard Michael Fischl, Karl Klare (Eds.), *Labour Law in an Era of Globalization*, Oxford 2002, p. 379ff. (p. 395).

⁶⁷³ James Atleson, *The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law*, in: Joanne Conaghan, Richard Michael Fischl, Karl Klare (Eds.), *Labour Law in an Era of Globalization*, Oxford 2002, p. 379ff. (p. 399).

Chapter V - Conclusion

The conclusion will first provide an assessment of the differences between the German and the British system of industrial relations that have been detailed in Chapter. It will be tried to determine which system is of more benefit to the individual worker and which is better equipped to deal with the problems presented in the previous chapter. Finally, some suggestions as to possible future courses of action for unions will be made.

Assessment of differences

Both systems try to achieve participation and improvement of working conditions by different means and the following section will try to highlight the benefits of each system on the background of which is better able to reach these aims. At the same time, the systems will be analysed as to which might be better equipped to deal with the problems presented in Chapter X. 'Improved working conditions' will mainly be understood as better pay and more job security.

Strike Activity

A high level of strike activity might be adverse for the economy and thus, eventually, adverse for the worker. However, taking the firm's interest into account could turn out to be a mixed blessing for unions: employers might use profits to invest in rationalisation measures. Similarly, with peaceful industrial relations they may have time and opportunity to restructure according to profitability lines, which are not necessarily beneficial for employees. Political factors have to be taken into

consideration, too. It's a question of how unions are perceived – as politically radical agents who are willing to fight for their goals (even outside the mere sphere of working conditions), or merely as service providers for their members. These perceptions might be important in recruiting more members or trying to exert political influence and it seems, at first glance, as if German unions had chosen the second path. However, German unions have been and still are a voice in German politics speaking up on issues of social justice, even though they do not have a party affiliation like the TUC to the Labour Party. British unions tried to achieve their goals with more militancy, but it should be remembered that this militancy helped Thatcher come to power and to eventually subdue the unions.

Less controversial industrial relations therefore might be of more benefit.

Union Structure

Multi-unionism is prevalent in the UK, while German unions are structured along industry lines.

Multi-unionism can be judged on three criteria: benefit to members, advantages and disadvantages to the employer and impact on the general public⁶⁷⁴.

⁶⁷⁴ A. I. R. Swabe, Patricia Rice, Multi-Unionism in the Fire Service, *in*: Industrial Relations Journal, Vol. 14, No. 4, p. 56ff. (p. 62).

Competition for members might be carried out by offering lower subscription rates and more service than competitors. A slump in membership might be another reason for financial problems. Most mergers took place when pay and prices were rising rapidly and it seemed as if only unions with at least 200,000 members had enough funds to provide the services required. Mergers were also seen as a means of achieving a wider field available to recruit in for members, and also as a possibility to obtain new bargaining rights and enhancing bargaining power.

(Robert Buchanan, Mergers in British Trade Unions 1949-79, *in*: Industrial Relations Journal, Vol. 12, No. 3, p. 40ff. (p. 44ff.); John Black, Anne-Marie Greene, Peter Ackers, Size and Effectiveness: a Case Study of a Small Union, *in*: Industrial Relations Journal, Vol. 28, No. 2, p. 136ff. (p. 137).)

Members might benefit from a large unions' ability to use funds more effectively and efficiently in terms of organisation and research; furthermore, time otherwise spend in competition with other unions is saved⁶⁷⁵. Competition for members may have negative effects on unions, who might decide to fight for members by offering lower rates than other unions, which might lead to financial troubles. Also, unions might pay too much attention to topics and services they think might attract members (and often do not, see Chapter IV) instead of focusing on the core areas representation and collective bargaining⁶⁷⁶. Additionally, only a fraction of a large union's members will be on strike at any one time, thus those unions will have fewer problems in financing a dispute⁶⁷⁷. A larger union might also have more influence political or within the TUC or DGB⁶⁷⁸.

On the other hand, also smaller, more specialised unions offer benefits: they might be better able to provide for special needs of a certain trade and to take the interest of their members more directly into account than a larger union with a more diverse composition of workers⁶⁷⁹. Negotiations in smaller bargaining units by smaller, more

On a first glimpse, a larger union seems naturally to have more bargaining power. But this effect might be counteracted if a small, specialized union manages to organize almost all workers in their special field.

(see: John Black, Anne-Marie Greene, Peter Ackers, Size and Effectiveness: a Case Study of a Small Union, *in*: Industrial Relations Journal, Vol. 28, No. 2, p. 136ff. (p. 145).)

⁶⁷⁵ A. I. R. Swabe, Patricia Rice, Multi-Unionism in the Fire Service, *in*: Industrial Relations Journal, Vol. 14, No. 4, p. 56ff. (p. 62).

It might be said that unions will eventually loose ground if they concentrate on inter-union rivalry rather than collective bargaining. However, there is machinery available in the TUC to deal with competition issues between different unions (*Bridlington Rules*). The DGB has similar provisions in its rules (see footnote 41).

⁶⁷⁶ Mike Rigby, Approaches to the Contemporary Role of Trade Unions, *in*: Mike Rigby, Roger Smith, Teresa Lawlor (Eds.), *European Trade Unions – Change and Response*, London 1999, p. 18ff. (p. 20).

⁶⁷⁷ Robert Buchanan, Mergers in British Trade Unions 1949-79, *in*: Industrial Relations Journal, Vol. 12, No. 3, p. 40ff. (p. 44ff.).

⁶⁷⁸ A. I. R. Swabe, Patricia Rice, Multi-Unionism in the Fire Service, *in*: Industrial Relations Journal, Vol. 14, No. 4, p. 56ff. (p. 63).

⁶⁷⁹ David Metcalf, Jonathan Wadsworth, Peter Ingram, Multi-Unionism, Size of Bargaining Group and

specialised unions might be more effective and thus favourable, especially when the overall workforce is fairly diverse⁶⁸⁰. Furthermore, smaller unions might be less prone to conflicts of interest between groups of members⁶⁸¹. Closer contact between members and between members and leadership could facilitate a stronger sense of union-identity⁶⁸² that might also provide for better representation; smaller unions might thus be favourable in a union-based representational system like the British⁶⁸³.

Employers dealing with larger unions need to negotiate with fewer partners, making negotiations cheaper, easier and probably more effective. Additionally, the enterprise is less likely to be used as a battlefield for inter-union rivalries and employers lose the chance to play off one union against the other. Also, management might prefer to demonstrate a tough approach on a small union (thereby influencing the rest of the workforce) rather than risking an industrial dispute with a large union organising nearly the whole workforce⁶⁸⁴. On the other hand, multiple unionism is likely to make

Strikes, *in*: Industrial Relations Journal, Vo. 24, No. 1, p. 3ff. (p. 4ff.).

⁶⁸⁰ David Metcalf, Jonathan Wadsworth, Peter Ingram, Multi-unionism, Size of Bargaining Group and Strikes, *in*: Industrial Relations Journal, Vol.24, No. 1, p. 3ff (p. 9).

⁶⁸¹ A. I. R. Swabe, Patricia Rice, Multi-Unionism in the Fire Service, *in*: Industrial Relations Journal, Vol. 14, No. 4, p. 56ff. (p. 62).

Those conflicts could centre around competition for jobs between different occupational groups in one union, or role-conflicts between those with managerial authority and those subjected to it could ensue (Swabe and Rice, *cit. opp*, p. 62)

⁶⁸² David Metcalf, Jonathan Wadsworth, Peter Ingram, Multi-unionism, Size of Bargaining Group and Strikes, *in*: Industrial Relations Journal, Vol.24, No. 1, p. 3ff (p. 9).

⁶⁸³ A. I. R. Swabe, Patricia Rice, Multi-Unionism in the Fire Service, *in*: Industrial Relations Journal, Vol. 14, No. 4, p. 56ff. (p. 65); John Black, Anne-Marie Greene, Peter Ackers, Size and Effectiveness: a Case Study of a Small Union, *in*: Industrial Relations Journal, Vol. 28, No. 2, p. 136ff. (p. 141, 145).

⁶⁸⁴ David Metcalf, Jonathan Wadsworth, Peter Ingram, Multi-unionism, Size of Bargaining Group and Strikes, *in*: Industrial Relations Journal, Vol.24, No. 1, p. 3ff (p. 9); A. I. R. Swabe, Patricia Rice, Multi-Unionism in the Fire Service, *in*: Industrial Relations Journal, Vol. 14, No. 4, p. 56ff. (p. 63); David Metcalf, Jonathan Wadsworth, Peter Ingram, Multi-unionism, Size of Bargaining Group and Strikes, *in*: Industrial Relations Journal, Vol.24, No. 1, p. 3ff (p. 9).

negotiations more time-consuming and costly, and “divide and rule” might not work as hoped when other unions take the first negotiated agreement as model for their own negotiations⁶⁸⁵.

Finally, the public at large is affected by the size of unions. Multi-unionism might be “contributing to demarcation disputes, restrictive practices, industrial action and thus consequent inefficiency and economic loss”⁶⁸⁶.

While multi-unionism is likely to result in a higher strike-rate, the number of conflicts depends on the number of bargaining units rather than the number of unions. Strikes are most likely to occur in connection with collective bargaining and the more negotiations are taking place, the more opportunity there is for disagreement⁶⁸⁷. While multi-unionism is likely to increase the probability of multiple bargaining units, this is not

⁶⁸⁵ David Metcalf, Jonathan Wadsworth, Peter Ingram, Multi-Unionism, Size of Bargaining Group and Strikes, *in*: Industrial Relations Journal, Vol. 24, No. 1, p. 3ff. (p. 9).

This effect, of course, might be used by management as well. Employers might prefer bargaining with a small and weak union first and use the outcome as model for negotiations with stronger unions.

⁶⁸⁶ A. I. R. Swabe, Patricia Rice, Multi-Unionism in the Fire Service, *in*: Industrial Relations Journal, Vol. 14, No. 4, p. 56ff. (p. 63).

In fact, research has found that strikes are more common in multi-union companies that conduct multiple bargaining. There are more annual pay rounds thus there is a bigger risk of industrial action.

(David Metcalf, Jonathan Wadsworth, Peter Ingram, Multi-unionism, Size of Bargaining Group and Strikes, *in*: Industrial Relations Journal, Vol. 24, No. 1, p. 3ff. (p. 4, 7).)

It was stated that “negotiations with the employer are likely to be more complicated if there are a large number of parties who must be compliant with the agreement ... multi-unionism increases the number of effective participants, which reduces the prospects of cooperation.”

David Blanchflower, John Cubbin, Strike Propensities at the British Workplace, *in*: Oxford Bulletin of Economics and Statistics, Vol. 48, No. 1, p. 19ff. (p. 33).

⁶⁸⁷ David Metcalf, Jonathan Wadsworth, Peter Ingram, Multi-Unionism, Size of Bargaining Group and Strikes, *in*: Industrial Relations Journal, Vol. 24, No. 1, p. 3ff. (p. 4ff.). The authors have shown that the likelihood for strikes rises with the presence of 4 or more bargaining units.

inevitable; in the same way as single-unionism might involve multiple bargaining units⁶⁸⁸. But, while single table bargaining by multiple unions educes the likelihood of strikes in comparison to them bargaining separately⁶⁸⁹, the sheer number of negotiators and the possible occurrence of “inter-group sources of tension” tend to make agreements harder to find even in a single bargaining unit⁶⁹⁰.

It has been supposed above that low strike incidence is an advantage; therefore, multi-unionism might be a disadvantage. The assessment regarding pay and job security depends on the economic situation. Multi-unionism might lead unions to exhaust themselves in competition with other unions; in that case they might be less able to engage in collective bargaining and negotiate favourable agreements. On the other hand, small unions might be better informed about the economic situation of the company and might therefore be able to bargain more effectively; however, a larger union will very likely have more bargaining power as it represents more workers.

With regard to workers’ participation, the size of unions is only of interest for the UK. As has been detailed above, small unions seem to be favourable, since they might be better able to concentrate on the enterprise in question. If they predominantly organise in one company, they might know more about the possibilities than unions organising a whole sector. Additionally, smaller unions are better able to keep in contact with their members and fewer members also mean that individuals are more likely to be heard.

⁶⁸⁸ David Metcalf, Jonathan Wadsworth, Peter Ingram, Multi-Unionism, Size of Bargaining Group and Strikes, *in*: Industrial Relations Journal, Vo. 24, No. 1, p. 3ff. (p. 4ff.).

⁶⁸⁹ David Metcalf, Jonathan Wadsworth, Peter Ingram, Multi-Unionism, Size of Bargaining Group and Strikes, *in*: Industrial Relations Journal, Vo. 24, No. 1, p. 3ff. (p. 8).

⁶⁹⁰ David Metcalf, Jonathan Wadsworth, Peter Ingram, Multi-Unionism, Size of Bargaining Group and Strikes, *in*: Industrial Relations Journal, Vo. 24, No. 1, p. 3ff. (p. 4); David Blanchflower, John Cubbin, Strike Propensities at the British Workplace, *in*: Oxford Bulletin of Economics and Statistics, Vol. 48, No. 1, p. 19ff. (p. 26).

On the other hand, sectoral organisation might have the benefit of co-ordinating knowledge and information from different industries. In that way, the danger of inter-enterprise competition might be lowered. The benefit of better contact to members is also annulled if smaller unions do not succeed in achieving recognition.

For union-members, the advantages and disadvantages of multi-unionism vs. industrial unionism seem to balance one another, while industrial unionism might be slightly favourable to the employer. That said, it seems that industrial unionism saves time and effort, and thus might foster productivity and economical performance; therefore it could be more beneficial for the employee in the long run. Some of the problems of large unions, e.g. distance to members or not being able to cater for special circumstances, could be solved by different interest groups within unions⁶⁹¹.

Under present circumstances, therefore, bigger unions with more bargaining power and a greater likelihood of recognition seem to be more favourable.

Level of Bargaining

Connected to the structure of the trade union movement is the level bargaining is predominantly conducted at. Smaller unions with a more local base tend to bargain locally, while industrial unions, organised nationally, tend to bargain at sectoral or even national level. Consequently, company bargaining is the most common form in Great Britain, while in Germany bargaining is conducted mostly at sectoral level.

⁶⁹¹ John Black, Anne-Marie Greene, Peter Ackers, Size and Effectiveness: a Case Study of a Small Union, *in*: Industrial Relations Journal, Vol. 28, No. 2, p. 136ff. (p. 139).

As with multi-unionism, there are advantages and disadvantages to sectoral bargaining. A disadvantage is that sectoral bargaining might lead to less wage flexibility. The same agreement will apply to all enterprises in the sector, regardless of size, location, economic performance or exposure to competition. While some firms might find fulfilling the requirements hard, others will pay less than they would have to under a company agreement. However, sectoral bargaining generally takes wider economic concerns into regard⁶⁹² and also a decentralised system does not automatically guarantee more individualistic settlements. There is evidence from the UK that agreements by certain large firms may acquire “pilot-character”, encouraging comparative claims⁶⁹³. The importance of bringing bargaining close to the place where the actual agreement will be carried out may speak in favour of company bargaining. A local agreement will be better able to take the specific situation and needs of the respective firm into consideration than a national agreement⁶⁹⁴, it will typically also be more flexible and easier to adapt to current situations⁶⁹⁵.

On the other hand, less flexibility might also lead to predictability and stability due to standardised wage levels throughout an industry. Sectoral agreements serve as a form of

⁶⁹² Heinz Tüselmann, Arne Heise, The German Model of Industrial Relations at the Crossroads: Past, Present and Future, *in*: Industrial Relations Journal, Vol. 31, No. 3, p. 162ff. (p. 165).

⁶⁹³ Heinz Tüselmann, Arne Heise, The German Model of Industrial Relations at the Crossroads: Past, Present and Future, *in*: Industrial Relations Journal, Vol. 31, No. 3, p. 162ff. (p. 170).

⁶⁹⁴ Hugh Armstrong Clegg, The System of Industrial Relations in Britain, 3rd Edition, Oxford 1976, p. 210f.

And, actually, trade unions in the UK often regarded national agreements as providing just-tolerable conditions for the weakest companies and spend much more energy to pursuing claims at company and workplace level, where far better terms could be achieved.

(Esmond Lindop, Workplace Bargaining – the End of an Era?, *in*: Industrial Relations Journal, Vol. 10, No. 1, p. 12ff. (p. 16).)

⁶⁹⁵ William Brown, Keith Sisson, Industrial Relations in the Next Decade. Current Trends and Future Possibilities, *in*: Industrial Relations Journal, Vol. 14, No. 1, p. 9ff. (p. 18).

minimum floor of wages and conditions, providing some social guarantees throughout the industry, thus offering equality, even if only on central points. They therefore “avoid a dispersion of the results of any agreement that might be obtained, should negotiations take place at a lower level”⁶⁹⁶. In times of high coverage, social dumping will be prevented and wages taken out of competition, forcing employers to “orientate themselves towards non-price competitive markets and to adopt a strategy of upskilling to sustain high and relatively even wage levels”⁶⁹⁷. Sectoral agreements offer some transparency of the different industrial branches or regional areas; their idea is to also protect individual employers from competition in terms of higher wages although in Germany this is constricted by the *Günstigkeitsprinzip*, which allows employers to offer more favourable conditions than laid down in the agreement. Additionally, sectoral agreements might provide guidance for smaller firms when deciding to make changes in wages or working conditions and might offer wage-stability: Turner observed that “other things being equal, the more decentralised the bargaining system, the faster wages are likely to move in whatever direction they are moving anyway”⁶⁹⁸.

Another advantage associated with sectoral bargaining is more peaceful industrial relations. Collective bargaining contains a great potential for conflict and less

⁶⁹⁶ J.F.B. Goodman, T.G. Whittingham, *Shop Stewards*, London 1973, p. 158ff; Organisation for Economic Co-Operation and Development, *Final Report, International Management Seminar Castelfusano, 21st - 24th September 1971, Recent Trends in Collective Bargaining*, Paris 1972, p. 32. Consequently it seems that in Germany, with predominantly national bargaining, living standards throughout the country (with the exception of eastern Germany, where agreements regularly provide for wages at only about 75% of the western standards) are comparable. The system of national bargaining might thus serve as a substitute for a minimum wage (there is no statutory minimum wage in Germany. Unions as well as employers used to be opposed to it, as it would interfere with free collective bargaining; however, very recently unions have started demanding the introduction of a minimum wage of 7,50€ per hour).

⁶⁹⁷ Heinz Tüselmann, Arne Heise, *The German Model of Industrial Relations at the Crossroads: Past, Present and Future*, in: *Industrial Relations Journal*, Vol. 31, No. 3, p. 162ff. (p. 166).

⁶⁹⁸ H. A. Turner, *Collective Bargaining and the Eclipse of Incomes Policy: Retrospect, Prospect and Possibilities*, in: *British Journal of Industrial Relations*, Vol. 8, p. 197ff. (p. 206).

bargaining rounds will therefore lead to less strike frequency and likelihood. Since bargaining is carried out by professional representatives of unions and employers at a higher level, industrial relations at company level are more peaceful⁶⁹⁹.

Again, an evaluation of the different systems depends on the economic situation. In prosperous times with greater bargaining power for unions, a system of company bargaining might be of benefit. Unions then will be able to put pressure on companies and reach higher settlements than they would be to on sectoral level, where also interests of firms not so well-off have to be taken into account. However, in times of full employment there might be danger that companies are overtaxed by local demands⁷⁰⁰. In harder times with less bargaining power sectoral level bargaining might be of advantage. Unions might be weaker on company level, therefore less likely to (and less successful in) press(ing) demands. Additionally, sectoral bargaining takes regard of the economic situation as a whole, therefore the agreement might provide better conditions than could have been achieved in struggling firms.

Legal Enforceability of Agreements

⁶⁹⁹ Heinz Tüselmann, Arne Heise, The German Model of Industrial Relations at the Crossroads: Past, Present and Future, *in*: Industrial Relations Journal, Vol. 31, No. 3, p. 162ff. (p. 170f.).

⁷⁰⁰ It has been stated that the British form of collective bargaining “is distinctive in the extent to which it permits bargaining over conduct of work at the workplace. Analysts of very varied persuasions are agreed that this provided employees in Britain with an internationally unusual ability to resist management attempts to raise effort, change working practices, or reduce real wages. There is thus broad agreement that workers resistance provides a constraint on Britain's international competitiveness, although opinions would differ on how central this was to the country's underlying economic problems”.

(William Brown, Keith Sisson, Industrial Relations in the Next Decade. Current Trends and Future Possibilities, *in*: Industrial Relations Journal, Vol. 14, No. 1, p. 9ff. (p. 20).)

A strong argument in favour of legal enforceability is that a legally binding agreement will provide security and stability for union members: they are able to rely on the provisions and to enforce them in court. Because the employer is generally in the stronger position economically, it is necessary to protect employees from his ability to impose terms and conditions of employment arbitrarily – hence the normative effect of the collective agreement and the (German) prohibition to agree on less favourable terms individually⁷⁰¹. Protection against the possibility to decline or forfeit his rights is also necessary⁷⁰², since employees could be forced to do so otherwise. The price for this security is the *Friedenspflicht*⁷⁰³: as long as the collective agreement is valid, no industrial action is to be taken⁷⁰⁴, resulting in less flexibility than the British system. While new agreements might be concluded before the end of the validity⁷⁰⁵, unions have no *Kampfmittel*⁷⁰⁶ to press their demands.

⁷⁰¹ Günter Schaub (Ed.), *Arbeitsrechts-Handbuch – Systematische Darstellung und Nachschlagewerk für die Praxis*, 11th Edition, München 2005, p. 1850, § 198, Rn. 5.

⁷⁰² A *Verzicht* (waiver) is only possible if both partner to the agreement agree in a *Vergleich* (settlement); a *Verwirkung* (forfeiture) is not possible, § 4 IV TVG.

⁷⁰³ Peace obligation.

⁷⁰⁴ Manfred Löwisch, *Arbeitsrecht*, 7th Edition, Düsseldorf 2004, p. 92, Rn 307.

The collective agreement has the point to bindingly tie down minimum terms and conditions for a certain period of time. It would be contradictory if the *Tarifvertragsparteien* (concluding partners) would be allowed to question those terms and conditions single-handedly during the validity. (Löwisch, cit. opp.) German unions adhere to this principle and very rarely call industrial action during the *Friedenspflicht*, the most notable exceptions being the wildcat strikes in 1969, 1973 and 2004.

However, the *Friedenspflicht* extends only to those issues covered by the agreement, so that it remains possible to resort to industrial action about other issues. An absolute *Friedenspflicht* that would prohibit any industrial action is not practiced in Germany. (Löwisch, cit. opp., Rn 308, 310)

⁷⁰⁵ Collective agreements are either valid for a certain period of time or might be terminated with notice if provided for in the agreement. However, even agreements that are valid for a certain time and thus cannot be terminated might be cancelled due to highly important reasons (§ 314 BGB), for example, if economic circumstances change and the carrying out would be unreasonable; but a offer to change the conditions has to be made before cancellation is possible. (BAG, 24. 1. 2001, 4 AZR 655/99, para 65ff; Löwisch, cit. opp. Rn. 253)

⁷⁰⁶ *Kampfmittel* are means of industrial action that a union can apply in order to press its demands.

Again, an assessment of the benefits needs to take the economic situation into regard. While voluntarism has its advantages by giving an opportunity to gain better terms in favourable times, there is also the danger inherent that, in less favourable times, workers have to agree to conditions worse than provided for in the collective agreement. As Deakin and Wilkinson observed in connection with working time:

“In the UK, over 41% of male workers were employed on average for more than 46 hours per week, compared to 23 for the EC as a whole. ... this was part of the legacy of *laissez-faire*, in particular the focus on industry-specific regulation and the absence of a general statutory floor to basic working conditions, ... the model set in this way by collective bargaining was no effective constraint on working long hours. No upper limit on overtime was set... ”⁷⁰⁷

Voluntarism therefore seems only feasible with strong unions that will assure that the conditions of the collective agreement are observed and it is doubtful whether a unionisation rate of 29%⁷⁰⁸ is sufficient. Therefore, a legalistic system seems to be more beneficial in times when the employers' side has more bargaining power; this applies to job security as well as pay. This is underlined by the observation that Health and Safety has long been subject to statutory legislation in Great Britain. If such important areas are subjected to statutory legislation one is left with the impression that voluntarism cannot be entirely trusted.

⁷⁰⁷ Simon Deakin, Frank Wilkinson, The Evolution of Collective *Laissez-Faire*, in: Historical Studies in Industrial Relations, No 17, Spring 2004, p. 1ff. (p. 35f.).

⁷⁰⁸ Department of Trade and Industry, Trade Union Membership 2005, <http://www.dti.gov.uk/er/emar/TUM2005.pdf>, last accessed May 2nd, 2006, p. 3. In 2004, the rate had been at 28.8 %, so that a slight improvement was to be observed (DTI, cit. opp. p. 3).

Systems of Representation

It has been detailed that workplace representation in Great Britain is still predominantly undertaken via recognised unions, although in the last years steps towards a statutory, union-independent system have been taken due to EC-influences. In Germany, on the other hand, representation is done by works councils, operating on company level independently from unions.

A steep decline in union-membership and a more adverse political climate for unions in the UK have led to a drop in recognition and therefore to a decline in numbers of those having access to workplace representation, while in Germany the (less dramatic) decline in unionisation has had hardly any effect on workplace representation.

However, for an evaluation the whole system of industrial relations present in a country has to be taken into account. The German model is built upon the distinction between works council representation within the plant and union negotiations outside of it, with works councils being prohibited from taking industrial action. This leads, as has been repeatedly pointed out, to more peaceful relations at company level, since the most controversial issues like pay and hours are exempted from company regulations⁷⁰⁹. In the UK these are regulated by unions on shop-floor level and the argument sometimes given by UK lawyers that only union representation can be effective because only unions can guarantee independence from the employer⁷¹⁰ has to be seen against this background.

First, also works councils are by law independent and their equipment with statutory rights may even enhance their independence. In fact, sec 5 of TURLA 1992 does not necessarily guarantee that a union cannot be influenced by the employer.

⁷⁰⁹ Hein Tüselmann, Arne Heise, The German Model of Industrial Relations at the Crossroads: Past Present and Future, *in*: Industrial Relations Journal, Vol. 31, No. 3, p. 162ff. (p. 165).

⁷¹⁰ Paul Davies, Claire Kilpatrick, UK Worker Representation after Single Channel, *in*: Industrial Law Journal, Vol. 33, No. 2, p. 121ff. (p. 128).

Secondly, the different systems produce different needs. A union that bargains for pay and conditions at the workplace must, since those issues are highly controversial, have more “industrial muscle” than a works council equipped with legal rights to participation and co-determination in certain matters. Legally backed rights makes representation effective even without the possibility to resort to industrial action. For example, works councils in Germany have relatively strong participation rights in dismissals whereas hardly any union in the UK is still in a position to wield any influence in this matter⁷¹¹. However, a works council is limited to the rights given to it by law whereas a union is only limited by their industrial strength. Depending on the individual circumstances, a union might therefore be able to achieve more⁷¹².

However, the stronger legal rights of works councils allow for more peaceful relations, as does the fact that the most controversial issues are exempted from workplace regulation. Additionally, legal rights seem preferable in times when union presence and recognition is in decline.

It is sometimes put forward that works councils are a danger to unions for encroaching into their sphere⁷¹³. Again, this is not a problem in Germany since the spheres of unions and works councils are separated. Rather, unions did manage to exert influence on works councils by exploiting the rights given to them in the *BetrVG* and thus using the councils to strengthen their position (see Chapter II). In the UK the situation is different. The single channel is the traditional form of workplace representation and any attempts to introduce stationary representation independent from unions amounts to an attack on

⁷¹¹ Richard Hyman, Is There a Case for Statutory Works Councils in Britain, *in*: Aileen McColgan (Ed.), *The Future of Labour Law*, London, New York 1996, p. 64ff. (p. 71f.)

⁷¹² A similar idea can be found in: Caroline Lloyd, What do Employee Councils do? The Impact of Non-Union Forms of Representation on Trade Union Organisation, *in*: *Industrial Relations Journal*, Vol. 32, No. 4, p. 313ff. (p. 321).

⁷¹³ *See*, for example, Paul Davies, Claire Kilpatrick, UK Worker Representation after Single Channel, *in*: *Industrial Law Journal*, Vol. 33, No. 2, p. 121ff.

the established system of company bargaining⁷¹⁴. Resistance from unions to works councils is therefore understandable. However, there is a real chance for unions to exert influence on works councils and a works council constituted from or at least with help of union members is also imaginable⁷¹⁵. Works councils might actually be used as a means to establish union presence in unorganised workplaces, since works councils (as they do in Germany) rely on union support⁷¹⁶.

The situation concerning union recognition in the UK is important, too. With less and less recognition, no real prospect of improvement and therefore a growing number of workers without access to representation, statutory works councils might not only be a way to close the ‘representation gap’ but also a way to prevent representation structures that are in fact dominated by employers⁷¹⁷. In any case, even strong advocates of union representation have to admit that representation by elected representatives is better than no representation at all⁷¹⁸.

There are, however, advantages of union-based representation. First, the ratio of works councillors to worker is quite high⁷¹⁹, which may lead to a distance between representatives and represented. If representation is done full-time, the effect of distance

⁷¹⁴ Paul Davies, Claire Kilpatrick, UK Worker Representation after Single Channel, *in*: Industrial Law Journal, Vol. 33, No. 2, p. 121ff. (p. 132).

⁷¹⁵ Paul Davies, Claire Kilpatrick, UK Worker Representation after Single Channel, *in*: Industrial Law Journal, Vol. 33, No. 2, p. 121ff. (p. 145).

⁷¹⁶ Richard Hyman, Is There a Case for Statutory Works Councils in Britain, *in*: Aileen McColgan (Ed.), The Future of Labour Law, London, New York 1996, p. 64ff. (p. 79).

⁷¹⁷ Richard Hyman, Is There a Case for Statutory Works Councils in Britain, *in*: Aileen McColgan (Ed.), The Future of Labour Law, London, New York 1996, p. 64ff. (p. 79, 81).

⁷¹⁸ Paul Davies, Claire Kilpatrick, UK Worker Representation after Single Channel, *in*: Industrial Law Journal, Vol. 33, No. 2, p. 121ff. (p. 133).

⁷¹⁹ Depending on the size of the *Betrieb*, it can be as high as one councillor to about 250 employees (*see for details* § 9 BetrVG).

to shop-floor problems might be boosted⁷²⁰. Secondly, there is a danger that councils might be drawn into management thinking, due to the cooperative nature of the relationship⁷²¹. Also, unions generally organise more than one plant and therefore have the opportunity to “generate comparative knowledge, accumulate skills and build up expertise”⁷²². However, works councils are not strictly limited to their plant as well. In firms with more than one plant, for example, there is the possibility to elect a firm, or even a concern council. Representation will be limited to concern structures though, so that representation by unions with industry wide organisation might be of advantage.

An assessment which representational system is of more benefit is rather difficult. Both have to be examined in the respective national context and can only work properly if embedded in it. While the British system relies on strong unions in the workplace, the German favours works councils with legally backed rights. Both have advantages and disadvantages and worked well under more favourable conditions in the 1970s. However, due to declining recognition, an adverse political climate and the fact that EC legislation has introduced (and seems to favour) more statutory elements, the British system has got into trouble. A statutory system, backed and supported by unions outside of and within the workplace, thus seems to be more favourable. Council-like structures, equipped with strong legal rights, are a way to provide workers with a voice in everyday industrial relations. They offer representation to a majority of employees and are independent from trade union recognition, therefore also providing representation in workplaces with strong anti-union employers. In present circumstances, British

⁷²⁰ Thomas Klikauer, Trade Union Shopfloor Representation in Germany, *in: Industrial Relations Journal*, Vol. 35, No 1, p. 2ff. (p. 11).

⁷²¹ Richard Hyman, Is There a Case for Statutory Works Councils in Britain, *in: Aileen McColgan (Ed.), The Future of Labour Law*, London, New York 1996, p. 64ff. (p. 79).

⁷²² Paul Davies, Claire Kilpatrick, UK Worker Representation after Single Channel, *in: Industrial Law Journal*, Vol. 33, No. 2, p. 121ff. (p. 128).

industrial relations would benefit from stronger legal representational rights.

The Directive for Information and Consultation has been a chance to introduce such structures; however, as has been detailed above, the implementation allows for flexibility and give employers the chance to prevent effective representation. It would therefore be desirable to amend the ICE regulations to introduce works council like structures in the UK, thus creating a second channel of industrial relations. However, in order for works councils to function properly, bargaining would need to change as well. Company bargaining will get into competition with councils and employers might try to pit the two against each other. If a second channel was to be implemented in the UK, it is therefore advisable to either build it with a strong integration of unions or at least for unions to work closely together with the new statutory bodies. In fact, close cooperation with unions, in terms of education of councillors, organisational support and the like, is also needed in Germany in order for works councils to be able to work effectively.

In summary, both systems have their pro and cons so that it is not possible to determine which system is *the* more beneficial. Widespread company bargaining might provide for higher wages, but it might also lead to calls for wage-restraints, when wages are outstripping productivity. Multi-unionism may have adverse effects in terms of efficiency but small, specialized unions might be better able to take care of a special sector of the workforce. Legally binding agreements provide security and are enforceable in courts, however, they lack flexibility. Still, in times of high unemployment, legally binding agreements might be of advantage, since when the firm struggles the employer can only challenge them in extraordinary circumstances. It has to be admitted, however, that agreements in Germany nowadays often provide for

*betriebliche Öffnungsklauseln*⁷²³ that allow for companies to agree on less favourable terms locally.

Equipment to Solutions and suggested Courses of Action

In the previous chapter, different solutions to national, international and global problems workers and unions face have been introduced. The aim of this research is to provide an assessment which of the two systems of industrial relations might be better adapted to present and future problems and might therefore give ideas for a future trade union movement. Therefore, the following part will try to determine which, if any, of the two systems might be better suited to the problems and solutions detailed above.

On a national scale, it is necessary for both German and British unions to integrate new types of members due to falling rates of unionisation and a change in the workforce. This might be easier for Germany's industrial unions. Organising manual as well as professional workers across a whole industry, they are used to deal with different needs and concerns of their members. The British system of multi-unionism with small and specialised unions might be ill adapted to these challenges. In fact, the UK experienced a trend towards larger and more general unions in recent years.

In order to overcome declining influence at the workplace, a "partnership approach" to industrial relations has been suggested. This is a far step from traditional British industrial relations, centred on conflict while Germany's more peaceful system might have less difficulties in adopting it. There, works councils equipped with statutory rights do secure labour's influence at the workplace in a more consensual way while union

⁷²³ Literally 'opening clauses on company level'; clauses in a collective agreement that allow employers to negotiate and agree with the works council on different, also less favourable, terms locally.

negotiations happen above the shopfloor level. Peaceful, partnership-like industrial relations at shopfloor level are therefore possible without unions losing their 'industrial muscle'. Despite the fact that recent EC legislation might introduce elements of a 'dual system' to the UK, such a division has not fully developed here yet and a partnership approach, adopted by unions, might contain some dangers and thus appears problematic. However, British unions need to find a way for meaningful industrial relations on company level, due to European legislation and also because managers are increasingly promoting company-based models to regulate conditions of employment. It has been suggested above that introduction of statutory representation bodies would be desirable; this, however, will pose a threat to unions position⁷²⁴.

Finally, unions will need to integrate the unemployed. It seems that German unions are better equipped to deal with this, since they are, as industrial unions, more used and better equipped to deal with diverse interests among their members.

It appears that the German model is better adapted to deal with possible solutions to problems on a national scale. The British model could benefit from the introduction of more and stronger legal rights in order to overcome the problems presented by loss of membership, an adverse political climate and a change in the structure of the workforce. However, also the German works council could benefit from stronger rights that would enable it to act instead of merely react.

On a European scale, coordinated wage bargaining is a concept that can be filled by national unions. In order to work, a certain degree of centralisation is necessary. Coordinated wage bargaining works on the assumption that unions in a certain sector bargain for similar terms and conditions across Europe. While this is feasible with small

⁷²⁴ Peter Leisink, Jim Van Leemput, Jacques Villokx, Introduction, *in*: Peter Leisink, Jim Van Leemput, Jacques Villokx (Eds.), *The Challenges to Trade Unions in Europe*, Cheltenham 1996, p. 1ff. (p. 8).

and specialised unions, it is much easier to organise with only a handful of industrial unions involved. Also, coordinated bargaining benefits from legally binding agreements. If agreements are not binding, they may be abrogated at any time and the effect of taking wages out of competition will not be achieved. Coordinated wage bargaining therefore seems to function better with a German style system of industrial relations.

While the other ways to take influence on European and global level mostly require European or global actors, it seems clear that also those benefit from legal rights and a certain degree of bindingness for agreements and contracts they might conclude. Especially International Framework Agreements need some sort of bindingness in order to be able to effectively provide a framework.

It seems therefore that a future trade union movement should be modelled on the German system rather than the British. However, it should be equipped with even stronger legal rights in order to be on a par with capital and I will present suggestions for desirable rights below.

Statutory rights are desirable on a European level, too. It has been mentioned before that a European minimum wage would help to take wages out of competition at least on a European scale. While Art 137(6) of the European Treaty prohibits the Commission from legislating on pay, Blanpain argued that such a minimum wage could be introduced via Art 95. He holds that

“the introduction of a single currency will create a strong incentive among the member states to start ‘competing’ in the area of minimum wages. It is beyond doubt that any such form of competition, driving wages down, will have a direct impact on the functioning of the Common Market. The establishment of a European

minimum wage by way of a directive with Art 95 TEC as its legal basis would thus be perfectly acceptable from a legal perspective.”⁷²⁵

Also coordinated bargaining could benefit from a minimum wage as it would prevent national agreements from falling below certain standards.

It has been detailed above that, while European action by trade unions is necessary, it is difficult for various reasons, one of these being that meaningful international campaigns need some industrial muscle. At the moment, capital enjoys quite extensive freedoms regarding the free movement of capital, goods and services⁷²⁶. These are not paralleled by respective rights on labour's side; especially, there is as yet no right for national unions to conduct international solidarity action on which campaigns like those carried out by the ITF rely. The frequently quoted statement that the EC should not facilitate a race to the bottom and that wages should be kept out of competition seems inconsistent against this background. Lord Wedderburn argued in 1972 that

“the international function of the trade union movement as a countervailing power to management in the multi-national enterprise demands recognition by *national* systems of labour law of a right to take collective action in support of industrial action in other countries against companies which are, in an economic sense, part of the same unit of internationalised capital.”⁷²⁷

However, solidarity strikes are, apart from narrow exceptions, illegal in the UK and Germany⁷²⁸. Additionally, also workers participating in a primary dispute are not protected from dismissal in the UK, since strike action will constitute breach of contract; while in Germany legal strikes will only suspend the employment contracts. In

⁷²⁵ Roger Blanpain, *European Labour Law*, London 2002, note 197.

⁷²⁶ Bob Hepple, *Labour Laws and Global Trade*, Oxford 2005, p. 186.

⁷²⁷ Bob Hepple, *Labour Laws and Global Trade*, Oxford 2005, p. 186.

⁷²⁸ Günter Schaub (Koch), *Arbeitsrechtshandbuch – Systematische Darstellung und Nachschlagewerk für die Praxis*, München 2005, § 193, Rn. 10 (p. 1868).

this regard it is important to note that the UK is the only EU country to be regularly reproved by the ILO for its industrial relations legislation⁷²⁹.

On international level, the right to strike is recognised by the ILO as well as the European Social Charta. While it is not set out explicitly in any ILO convention, two resolutions from 1957 and 1970 stress its recognition in member states. The first one stipulated the adoption of “laws ...ensuring the effective and unrestricted exercise of trade union rights, including the right to strike, by the workers”, while the latter

“invited the Governing Body to instruct the Director-General to take action in a number of ways 'with a view to considering further action to endure full and universal respect for trade union rights in their broadest sense', with particular attention to be paid, inter alia, to the 'right to strike'”⁷³⁰.

Another recommendation from 1951 states explicitly that none of its regulations shall interfere with the right to strike⁷³¹. Additionally, the “Declaration on Fundamental Principles and Rights at Work” requires member states to guarantee “freedom of association and the effective use of collective bargaining” and it can be argued that “effective use of collective bargaining” is only possible if accompanied by a right to take industrial action.

For a European trade union movement on equal footing with European capital the right to solidarity action is essential, as has been held by the Declaration of the ILO Committee of Experts, enacted with regard to the 1988 Employment Act in the UK. It

⁷²⁹ Roger Welch, *Judges and the law in British Industrial Relations: Towards a European Right to Strike*, in: *Social & Legal Studies*, Vol. 4 (1995), p. 175ff. (p. 192f.).

⁷³⁰ Bernard Gernigon, Alberto Odero, Horacio Guido, *ILO Principles Concerning the Right to Strike*, Geneva 1998, p. 7.

⁷³¹ ILO R92 Voluntary Conciliation and Arbitration Recommendation 1951, <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=93&chapter=2&query=right+to+strike&highlight=on&querytype=bool&context=0>, last accessed January 9th, 2007.

stated that

“it appears to the Committee that where a boycott relates directly to the social and economic interests of the workers involved in either or both of the original dispute and the secondary action, and where the original dispute and the secondary action are not unlawful in themselves, then that boycott should be regarded as a legitimate exercise of the right to strike”⁷³².

In 1996, the Commission considered “that workers should be able to call sympathy strikes provided that the initial strike they are supporting is itself lawful”.⁷³³ The right to strike and especially the right to sympathy strikes and secondary action thus effectively are recognised at international level by the ILO.

While on European level the EU Social Chapter recognises the right to strike, Art 137 (6) of the European Treaty detains the EU from legislating on pay, rights of association and the right to strike so that these areas are entirely left to the national states⁷³⁴.

Different ways for European labour to secure an influence and their weaknesses have been detailed in Chapter IV. Not only would most of these ideas benefit from a right to strike including a right to solidarity action, such a right could also help the ETUC. Having the possibility to organise campaigns across the EC could endow it with means

⁷³² ILO CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 United Kingdom (ratification: 1949) Published 1989, <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=233&chapter=6&query=secondary+action&highlight=on&querytype=bool&context=0#4>, last accessed January 9th, 2007

⁷³³ ILO CEACR: Individual Direct Request concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Congo (ratification 1960) Submitted: 1996, <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=6961&chapter=9&query=+sympathy+strike&highlight=on&querytype=bool&context=0>, last accessed January 9th, 2006.

⁷³⁴ Roger Blanpain, European Labour Law, London 2002, note 190f.; Roger Welch, Judges and the law in British Industrial Relations: Towards a European Right to Strike, *in*: Social & Legal Studies, Vol. 4 (1995), p. 175ff. (p. 193).

to be better noted on a national level; this could also foster a specific ETUC-identity that in turn could heighten awareness of European labour issues. Additionally, meaningful European bargaining could develop.

Exploiting the Social Dialogue to secure an amendment to the European Treaty that would delete Art 137(6) so as to allow the Commission to legislate for a Directive concerning the right to strike and, especially, the right to solidarity action is therefore strongly desirable. However, while it is desirable that such a right is laid down on European level, the different industrial relations traditions in the member states have to be kept in mind. Therefore, a European right needs to be flexible. Since all EU member states are members of the ILO and should therefore adhere to its principles, the adoption of similar rights modelled on the ILO recommendations and declarations by EU Directive seems feasible.

The example of the campaign against Flags of Convenience by the ITF has shown that sympathy action cannot be restricted to the EU, rather, the right needs to be global. Also the International Framework Agreements detailed in Chapter IV might be easier to implement with the possibility to take solidarity action. It is therefore important that, if a right to solidarity action is introduced by the EU, it is not restricted to conflicts within the European Community.